No. _____

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1998

GLORIA BYLINSKI, GLORIA BELLMAN, ALLAN COLLINS, DENNIS COATES, DOUGLAS HAMMAR, ROBIN HAMMAR, SANDRA HOLIDAY, STEVEN HOLIDAY, ROBERT JARRELL, ANISE PIERCE, RICHARD PRESSEY, JIMMY SEACRIST, and MOLLY SEACRIST, and all other persons similarly situated,

Petitioners,

-v-

CITY OF ALLEN PARK, a Michigan municipal corporation, CHARTER TOWNSHIP OF BROWNSTOWN, a Michigan municipal corporation, CITY OF ECORSE, a Michigan municipal corporation, CITY OF LINCOLN PARK, a Michigan municipal corporation, CITY OF RIVER ROUGE, a Michigan municipal corporation, CITY OF ROMULUS, a Michigan municipal corporation, CITY OF SOUTHGATE, a Michigan municipal corporation, CITY OF TAYLOR, a Michigan municipal corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There are two questions presented on appeal. First, whether the Sixth Circuit opinion below is in direct conflict with the Seventh Circuit regarding the application of the All Writs Act, 28 U.S.C. 1651(a), to obtain federal jurisdiction over non-parties in order to protect the integrity of a federal consent decree. Second, whether the Sixth Circuit was without authority when it upheld the finding of federal jurisdiction over a third party state constitutional law claim filed in state court so as to protect the integrity of a federal consent decree, to which the Petitioners were not a party, absent statutory authority.

PARTIES TO THE PROCEEDING

All of the parties on the caption were before the Court of Appeals. Those parties were: Gloria Bylinski, Allan Collins, Dennis Coates, Steven Holiday, Sandra Holiday, Richard Pressey, Jimmy Seacrist, Molly Seacrist, Gloria Bellman, Anise Pierce, Douglas Hammar, Robin Hammar, Robert G. Jarrell, City of Allen Park, Charter Township of Brownstown, City of Ecorse, City of Lincoln Park, City of River Rouge, City of Romulus, City of Southgate, and City of Taylor.

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Petitioners, Gloria Bylinski, Allan Collins, Dennis Coates, Steven Holiday, Sandra Holiday, Richard Pressey, Jimmy Seacrist, Molly Seacrist, Gloria Bellman, Anise Pierce, Douglas Hammar, Robin Hammar, and Robert G. Jarrell, (hereinafter Petitioners) respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has been recommended for publication and is reported at *Bylinski v. City of Allen Park*, 1999 FED App. 0092P (6th Cir.). App. A at 1a. Of the two opinions of the United States District Court for the Eastern District of Michigan, Southern Division, that are at issue, only one has been published and can be found at *Bylinski v. City of Allen Park*, 8 F.Supp.2d 965 (1998). App. B at 7a. The other opinion of the District Court at issue and is unpublished has been attached beginning at page 29a of the Appendix. App. C at 29a.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on January 25, 1999. App. A at 1a. This Court is conferred jurisdiction upon this Petition pursuant to 28 U.S.C. § 1245(1).

STATUTORY PROVISIONS INVOLVED

The All Writs Act, 28 U.S.C. § 1651(a), states:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Headlee Amendment, Mich. Const. 1963, art 9, § 31, states in pertinent part that:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or Charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or Charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon.

STATEMENT OF THE CASE

The facts of this case are simple, straight forward, and undisputed. The Respondents, in this case, assessed a local tax upon real and personal property without a vote of the qualified electors. In doing so, the Respondents intentionally violated the Headlee Amendment to the Michigan Constitution, Mich. Const. 1963, art. 9, § 31 (hereinafter Headlee Amendment). Pursuant to the Michigan Constitution and Michigan statutory law, jurisdiction of the

Petitioners' Headlee Amendment claim is vested exclusively in the Michigan Court of Appeals or in the Circuit Courts for the State of Michigan. Mich. Const 1963, art. 9, § 32; M.C.L.A. § 600.308a.

Although federal jurisdiction, as set forth in 28 U.S.C. § 1331, 1332, is admittedly absent, the lower courts upheld the removal of the Petitioners' state constitutional law case from state court because of the perceived interference of the Petitioners' case with the District Court's enforcement of a consent decree in the federal district court case, *United States v. Wayne County*, Civ. Action No. 87-70992 (E.D. Mich., Feikens, J.). Due to the lower courts use of *Wayne County* to obtain jurisdiction over Petitioners' state constitutional law case, a review of the facts and procedures surrounding this case and the *Wayne County* case is necessary in order to address the jurisdictional issues raised herein.

A. Statement of facts

The federal case of *Wayne County*, *supra*., arose from the State and Federal governments enforcement of the Clean Water Act, 33 U.S.C § 1251 et seq. The purpose of the federal lawsuit was to ensure that Wayne County and the downriver local governments in Michigan, which included the Respondents[1] in this action, complied with federal affluent treatment levels. After ten years of litigation, the government parties (the only litigants in *Wayne County* were governments) in the federal case eventually negotiated a mutually agreed upon Consent Decree and Final Judgment.

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[1] The Respondents in this case are as follows: City of Allen Park, Charter Township of Brownstown, City of Ecorse, City of Lincoln Park, City of River Rouge, City of Romulus, City of Southgate, and City of Taylor.

Pursuant to the Consent Decree and Final Judgment, Wayne County issued limited tax obligation bonds to finance the cost Wayne County incurred in its construction and improvements to Wayne County's waste treatment facilities; the repayment of Wayne County's limited tax obligation bonds were solely the responsibility of Wayne County and not the downriver local governments. The downriver local governments were to reimburse Wayne County for part of the cost Wayne County incurred in Wayne County's construction and improvements to Wayne County's waste treatment facilities.

In the *Wayne County* Final Judgment, the Respondents expressly confessed their intent to violate the Headlee Amendment to the Michigan Constitution, Mich. Const. 1963, art. 9, § 31, so as to satisfy their assigned reimbursement cost to Wayne County. The defendants in *Wayne County*, which included the Respondents in this case, agreed between themselves and "assured" the District Court that the Respondents would not "contest" the imposition of the tax; a tax that was in excess of, and in violation of, applicable charter, statutory and constitutional limitations. In other words, the Respondents', agreed to willfully impose upon the Petitioners, without prior popular vote approval of the qualified electorate, a new tax, unconstitutional on its face. To insure the government parties' complacency regarding the Respondents' intent to violate the Headlee Amendment to the Michigan Constitution, the District Court[2] issued the an Injunction on May 12, 1994, whereby the District Court enjoined any one, including non-parties, from conducting any type of proceeding that would interfere with

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[2] The same District Court judge presided over both this case and the *Wayne County* case.

the implementation of Consent Decree and the Final Judgment.

In accordance with their intent set forth in the Consent Decree, the Respondents levied and collected a new tax (hereinafter Judgment Tax) upon the Petitioners - residents and taxpayers who reside within one of the Respondents. Labeled variously as the sewer tax, EPA levy, or Wayne County Judgment on the Petitioners' real property tax bill, the Judgment Tax was never submitted by the Respondents for popular vote, nor was the Judgment Tax approved by the Petitioners by popular vote pursuant to the Headlee Amendment to the Michigan Constitution, Mich. Const. 1963, art. 9, § 31.

In addition, there are several important facts that should be noted. First, the Petitioners were never parties or in privity with any of the parties in *Wayne County, supra.* Second, the Petitioners' were never subject to the jurisdiction of the federal court in *Wayne County, supra.* Third, the Petitioners were never provided notice of the Injunction. Finally, and most importantly, the Petitioners never consented to the Respondents levy and collection of the Judgment Tax. In sum, the Respondents' taxation of the Judgment Tax violated the Headlee Amendment to the Michigan Constitution, and thus, requires the Respondents to refund to the Petitioners all monies the Respondents unconstitutionally collected from the Petitioners.

B. Course of proceedings and disposition below

On March 4, 1998, the Petitioners, on behalf of themselves and all others similarly situated, filed suit in Wayne County Circuit Court, State of Michigan, alleging a sole state constitutional claim against the Respondents as a result of the Respondents' violation of the Headlee Amendment to the Michigan Constitution, Mich. Const. 1963, art. 9, § 31. The unconstitutional tax at issue was voluntarily levied and collected without consent by vote of the qualified electorate in order to satisfy the Final Judgment in *Wayne County*, *supra*.

On March 23, 1998, the Respondents, pursuant to 28 U.S.C. §§ 1441(a) and (b) and 1446, filed their Notice of Removal. Following which, the Petitioners filed a Motion for Remand, Motion for Recuse and Affidavit for Disqualification of Judge on April 13, 1998. On April 15, 1998, the Respondents filed a Motion to Incorporate the entire record of *Wayne County*, *supra*., into the record of this proceeding.

The District Court heard oral arguments on the Petitioners' two Motions and Affidavit and on the Respondents' Motion to Incorporate the Record on May 21, 1998. At the conclusion of the hearing, the District Court denied the Petitioners' Motion for Remand, Motion for Recuse and Affidavit for Disqualification of Judge and granted the Respondents' Motion to Incorporate the Record. On June 9, 1998, the District Court issued a written Opinion and Order Denying the Petitioners' Motion to Recuse and a written Opinion and Order Denying the Petitioners' Motion for Remand. In the Remand opinion the District Court held

that removal was proper because of the courts "inherent power to enforce agreements entered into in settlement of litigation pending before them." App. C at 30a- 31a (citations omitted). The District Court also held that removal was proper based upon the All Writs Act, 28 U.S.C. § 1651(a). App. C at 31a. It is important to note that the District Court did not find any independent basis of federal jurisdiction beyond the perceived interference with the Consent Decree in *Wayne County, supra.*

Also on June 9, 1998, the District Court entered in Order granting the Respondents' Motion to Incorporate the Record.

On May 12, 1998, the Respondents filed their Motion for Summary Judgment pursuant to F.R.C.P. 56. On May 19, 1998, the Petitioners also filed a Motion for Summary Judgment pursuant to F.R.C.P. 56. Before oral arguments were heard on the Petitioners' and Respondents' Motions, the Petitioners filed a Stipulation and proposed Order, in part, amending the Petitioners' Complaint as follows: adding the City of Romulus and the Charter Township of Brownstown as Defendants; adding Gloria D. Bellman, Anise Pierce, Douglas Hammer, Robin Hammar and Robert G. Jarrell as named Plaintiffs; and withdrawing George Coates d/b/a D&A Collision as a named Plaintiff. On June 9, 1998, the District Court entered the Petitioners' aforementioned Stipulation and proposed Order Amending the Petitioners' Complaint.

On June 1, 1998, the District Court heard oral arguments on both the Petitioners' and the Respondents' Motions for Summary Judgment. From that hearing, the District Court issued a written Opinion and Order, on June 9, 1998, granting the Respondents' Motion for Summary

Judgment dismissing the Petitioners' case. In doing so, the District Court significantly overextended the authority of a federal district court to enforce federal judgments and misconstrued and misapplied Michigan law regarding the Headlee Amendment to the Michigan Constitution, laches, and the Bigger Doctrine. The District Court also ignored the Respondents' express admission to violating the Headlee Amendment.

On appeal to the Sixth Circuit, the Petitioners sought review of the District Court's denial of the Petitioners' Motion for Remand and the District Court's grant of the Respondents' Motion for Summary Judgment. Upon review, the Sixth Circuit affirmed the District Court's Order denying Petitioners' Motion for Remand. According to the Sixth Circuit, the federal court was conferred jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1245(1), and pursuant to the court's authority to protect the "integrity" of its consent decrees.

The Sixth Circuit also affirmed the District Court's grant of Respondents' Motion for Summary Judgment. However, unlike the District Court, the Sixth Circuit declined to rule upon whether the Petitioners had stated a valid state constitutional law claim; instead, the Sixth Circuit affirmed only the District Courts finding that laches barred Petitioners' case.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE SIXTH CIRCUIT OPINION BELOW IS IN DIRECT CONFLICT WITH THE SEVENTH CIRCUIT REGARDING THE APPLICATION OF THE ALL WRITS ACT, 28 U.S.C. § 1651(a), TO OBTAIN FEDERAL JURISDICTION OVER NON-PARTIES IN ORDER TO PROTECT THE INTEGRITY OF A FEDERAL CONSENT DECREE.

Petitioners request this Court to grant this Petition because the Sixth Circuit opinion below is in direct conflict with the Seventh Circuit regarding the application of the All Writs Act, 28 U.S.C. § 1651(a), to obtain federal jurisdiction over non-parties in order to protect the integrity of a federal consent decree.

In affirming the District Court's denial of the Petitioners' Motion for Remand based upon the All Writs Act, 28 U.S.C. § 1651(a), the Sixth Circuit held that:

> We also agree that the district court correctly invoked 28 U.S.C. § 1651(a), that All Writs Act, which gives federal court the authority to remove an otherwise unremovable state court case in order to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained. *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1431 (2nd Cir. 1993) (internal quotation marks omitted).

App. A at 5a. However, contrary to the District Court's Opinion and the Sixth Circuit's affirmation, the All Writs Act is not a vehicle for establishing federal court jurisdiction. As stated in *Mongelli v. Mongelli*, 849 F.Supp. 215 (S.D.N.Y. 1994), in declining to rely on the All Writs Act and thereby holding the court lacked subject matter jurisdiction, the All Writs Act is not a catch-all statute granting jurisdiction when all else fails. *Mongelli, supra.* at 220. Or as this Court has held:

> Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.

Pennsylvania Bureau of Correction v. United States Marshals Serv., 474 U.S. 34, 43 (1985). Most importantly, the All Writs Act does not provide an independent basis of jurisdiction; it can aid, but it cannot be relied upon as the sole and singular basis of federal jurisdiction. *Hillman v. Webley*, 115 F.3d 1461 (10th Cir. 1997); *Auburn Medical Center, Inc. v. Peters*, 953 F.Supp. 1518 (M.D. Ala. 1996).

Here, the Petitioners have asserted a single state constitutional taxation claim. The state constitutional provision at issue, the Headlee Amendment, Mich. Const. 1963, art. 9, § 31, was enacted to insure that certain procedural and constitutional requirements are met before any tax may be assessed, collected and/or levied against a Michigan taxpayer. *Taxpayers Allied for Constitutional Taxation v. Wayne County*, 537 N.W.2d 596, 450 Mich. 119 (1995). Application of the Headlee Amendment will not interfere or set aside the District Courts Consent Decree or

Final Judgment. It is the assessment and levy of a municipal tax by the Respondents to pay the amounts owed under the *Wayne County* Final Judgment which is the core of Petitioners' claim. As the Petitioners' Headlee Amendment claim does not depend upon a question of federal law and a jury can reach a finding as to the violation of the constitutional provision without addressing a federal statute, the Petitioners' suit is not removable. *Thompson v. Merrell Dow Pharmaceuticals Inc.*, 766 F.2d 1005 (6th Cir. 1985).

Since there exists no independent basis for federal court jurisdiction of the Petitioners' state constitutional law claim, the All Writs Act cannot be utilized to remove Petitioners' case. Briefly, however, the Petitioners' respond to the lower court's reliance on *In re Agent Orange Product Liability Litigation*, 996 F.2d 1425 (2nd Cir. 1993), for the proposition that the All Writs Act supports removal of the Petitioners' Complaint.

In re Agent Orange Product Liability Litigation involved an attempt by the plaintiff, who was an unnamed class member in a federal court class action, to circumvent the federal class action court settlement by filing suit in state court.[3] The plaintiff, who never opted out of the federal class action, sought to re-litigate the same issues that were fully decided upon by the federal class action.

The Second Circuit found that "[a] review of the arguments, orders and judgment in *Agent Orange I* makes it crystal clear that the court in fact did determine the central issue [raised by the plaintiff]". *In re Agent Orange Product*

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[3] Unlike the plaintiff in *In re Agent Orange Product Liability Litigation*, the Petitioners were not parties or in privity with any of the parties to the Consent Decree in the *Wayne County* case.

Liability Litigation, supra. at 1432. Based upon this finding, the Second Circuit upheld the district court's ruling that federal jurisdiction was proper under the All Writs Act. However, the Second Circuit was quick to point out the limitations associated with the All Writs Act in obtaining federal jurisdiction over state law claims: "In so holding, we are not unmindful of the fact that the All Writs Act is not a jurisdictional blank check which district courts may use whenever they deem it advisable." *In re Agent Orange Product Liability Litigation, supra.* at 1431.

This case, instead, should be controlled by *Application of County Collector of Winnebago County,* 96 F.3d 890 (7th Cir. 1996), as the two cases factually and legally parallel each other. The plaintiffs in *Winnebago County* challenged in state court the constitutional authority of their local governmental officials who had imposed a local tax in violation of the state constitution. The funds raised by the alleged unconstitutional tax were to be applied as payment on a federal consent decree. Much like in this case, the enforcement of the plaintiffs' state constitutional claim would not set aside the federal consent decree, nor would it undermine issues previously litigated and decided upon in the previous federal court case. In reversing the district court's application of the All Writs Act to obtain jurisdiction over the plaintiffs' state constitution case filed in state court, the *Winnebago County* court held:

> [I]n a case such as this where a consent decree was entered without findings of liability or necessity, the All Writs Act does not permit the removal of a third-party action claiming that a party to the consent decree acted without authority under state law.

Winnebago County, supra. at 901-902.

In contradiction to the express limitations to the All Writs Act espoused by the Seventh Circuit, the District Court and the Sixth Circuit utilized the All Writs Act simply to preclude a collateral attack on a local tax as unconstitutional pursuant to the Headlee Amendment to the Michigan Constitution; the All Writs Act should not be used to hide the Respondents agreement to violate the Michigan Constitution. Therefore, because of the overwhelming factual similarities and the divergent legal positions between the Sixth and Seventh Circuits, this Court must grant this Petition in order to rectify the conflict.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE SIXTH CIRCUIT WAS WITHOUT AUTHORITY WHEN IT UPHELD THE FINDING OF FEDERAL JURISDICTION OVER A THIRD PARTY STATE CONSTITUTIONAL LAW CLAIM FILED IN STATE COURT SO AS TO PROTECT THE INTEGRITY OF A FEDERAL CONSENT DECREE, TO WHICH THE PETITIONERS WERE NOT A PARTY, ABSENT STATUTORY AUTHORITY.

Petitioners request this Court grant their Petition because the Sixth Circuit was without authority when it upheld the finding of federal jurisdiction over a third party state constitutional law claim filed in state court so as to protect the integrity of a federal consent decree, to which Petitioners were not a party, absent statutory authority. In finding federal jurisdiction, the Sixth Circuit held:

> The district court correctly noted that implementation and enforcement of compliance with the 1994 consent decree gave it continued jurisdiction over the financing agreements that constituted an integral part of the order, citing *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1018 (6th Cir. 1995). The court further found that the instant lawsuit poses an imminent threat to the integrity of the Financing Orders because it could affect the financing mechanism in those orders. We agree.

App. A at 4a. However, the lower court's reliance on *Vanguards of Cleveland* for this proposition as applied in this case is misplaced and unfounded.

The court in *Vanguards of Cleveland* never addressed whether a district court could obtain federal jurisdiction over a non-party's state constitutional law claim filed in state court in order to effectuate a federal court consent decree never agreed to by the state court plaintiffs. Instead, the focus of *Vanguards of Cleveland* was on the authority the federal courts have in modifying consent decrees. By applying the rules pertaining to modification of consent decrees as between parties to obtain jurisdiction over non-parties, as occurred in this case, the *Bylinski* lower courts excessively expanded federal court jurisdiction and significantly distorted the holding in *Vanguards of Cleveland.*

Notwithstanding the fact that *Vanguards of Cleveland* never touched upon the issue at hand, the foundation against the extension of federal jurisdiction based upon a consent decree, absent statutory authority, can be found in the

Vanguards of Cleveland opinion. According to the *Vanguards of Cleveland* court, "[o]nce approved, the prospective provisions of the consent decree operate as an injunction." *Vanguards of Cleveland, supra.* at 1018 (quoting *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983)). And, it is because of the "injunctive quality" of the consent decree that enables the court to retain jurisdiction over the enforcement of the consent decree. *Vanguards of Cleveland, supra.*

However, the courts injunctive authority is not unlimited. It has long been held that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Martin v. Wilks*, 490 U.S. 755, 761-762 (1989) (citations omitted). Similarly, an injunction can have no force or effect upon one not a party to a legal proceeding. F.R.C.P. 65(1)(d); *Chase National Bank v. City of Norwalk*, 291 U.S. 431 (1934). The principle of limited federal jurisdiction was best summarized by Judge Learned Hand in *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2nd Cir. 1930). According Judge Hand:

> [N]o court can make a decree which will bind any one but a party; . . . It cannot lawfully enjoin the world at large, no matter how broadly it words it decree. . . . It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court.

Alemite Mfg. Corp., supra. at 832-833 (quoted in *Swetland v. Curry*, 188 F.2d 841, 843 (6th Cir. 1981)).

The fact that a consent decree is at issue does not alter this basic principle. "Consent decrees are contracts. Their force comes from the agreement of the parties, not from the statute on which the complaint was based." *Dunn v. Carey*, 808 F.2d 555, 559 (7th Cir. 1986) (citing *Firefighters Local 93 v. City of Cleveland*, 478 U.S. 501 (1986)). As this Court held in *Martin*, *supra.*, "[a] voluntary settlement in the form of a consent decree between one group . . . cannot possibly settle, voluntarily or otherwise, the conflicting claims of another group . . . who did not join in the agreement." *Martin*, *supra.* at 2188; See also *Dunn v. Carey*, 808 F.2d 555, 560 (7th Cir. 1986) ("Third parties, not even colorably bound by the decree, also should be able to challenge the authority of the person assenting to the decree."). "While parties can settle their litigation with consent decrees, they cannot agree to 'disregard valid state laws', (citations omitted), and cannot consent to do something together that they lack the power to do individually." *Perkins v. City of Chicago Heights*, 47 F.3d 212, 216 (7th Cir. 1995).

This limitation of federal jurisdiction, even when the court is attempting to protect the integrity of a consent decree, was emphasized in *Winnebago County*, *supra.* As previously noted, the *Winnebago County* plaintiff tax objectors filed suit in state court alleging violations of Illinois state constitutional tax law by the defendant school district, seeking a refund of all taxes illegally collected by the defendant. The taxes were levied by the school district under the direction of a federal court consent decree, entered in a previous case, which sought to remedy alleged racial discrimination in the school district; the plaintiff tax objectors were not a party to the federal district court case.

The principal argument of the tax objectors was that the school district did not have the authority to levy the "consent decree" tax. The school district responded by removing the plaintiffs' state case. The federal district court held that it had jurisdiction over the state law tax case "because the state tax cases could effectively frustrate the school district's implementation of the consent decree entered in the discrimination lawsuit." *Winnebago County*, *supra.* at 892. The Seventh Circuit disagreed with the lower court. According to the Seventh Circuit, "the tax objectors who were not parties to the consent decree, are not bound by the consent decree and are entitled to 'their own day in court' to challenge actions taken under the decree." *Winnebago County*, *supra.* at 895 (citing *Martin*, *supra.* at 762). As a result, the Seventh Circuit held that:

> Because a consent decree's force comes from agreement rather than positive law, the decree depends on the parties authority to give assent . . . . Third parties, not even colorably bound by the decree, . . . should be able to challenge the authority of the person assenting to the decree. Some rules of law are designed to limit the authority of public officeholders, to make them return to other branches of government or to the voters for permission to engage in certain acts. They may chafe at these restraints and seek to evade them; if they do, the people for whose protection the restraints were created are entitled to repair to the forums designed to hear arguments that officeholders have acted without authority.

Winnebago County, supra. at 901.

This extension federal jurisdiction to cover non-parties when such non-parties conduct "poses an imminent threat to the integrity of the [Consent Decree]"[4] directly conflicts with the "injunctive quality"[5] that govern the court's authority over a consent decree. For this reason, this Petition should be granted so that this Court can reaffirm the basic principals of the court's authority over the enforcement of a consent decree and thereby restrict the expansion of federal jurisdiction absent statutory authority.

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4 App. A at 5a.

5 *Vanguards of Cleveland, supra.* at 1018.

CONCLUSION

The jurisdiction issues in this case provide the Court with an excellent opportunity in which to clarify the jurisdictional limitations placed upon the federal court's enforcement of federal consent decrees. If the lower court's opinions are allowed to stand unabridged, the potential for further abuses by state governmental parties in using a federal consent decree, and the power of the federal courts, when compliance with state constitutional and statutory limitations of their authority is inconvenient, will definitely increase. By granting this Petition, the Court can not only prevent such future abuses, but also rectify the direct conflict between the Sixth and Seventh Circuits as to the application of the All Writs Act to obtain federal jurisdiction over non-parties in order to protect the integrity of a federal consent decree. In doing so, this Court can reaffirm the basic principle of limited federal jurisdiction. As such, Petitioners respectfully request that their Petition for writ of certiorari be granted.

Respectfully submitted,

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GLORIA BYLINSKI et al., Plaintiffs-Appellants, v. THE CITY OF ALLEN PARK et al., Defendants-Appellees.

No. 98-1725

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1999 U.S. App. LEXIS 1221

January 25, 1999, Filed*

DISPOSITION: AFFIRMED.

COUNSEL: For GLORIA BYLINSKI, ALLAN COLLINS, DENNIS COATES, STEVEN HOLIDAY, SANDRA HOLIDAY, RICHARD PRESSEY, JIMMY SEACRIST, MOLLY SEACRIST, GLORIA D. BELLMAN, ANISE PIERCE, DOUGLAS HAMMAR, ROBIN HAMMAR, ROBERT G. JARRELL, Plaintiffs - Appellants: Peter W. Macuga, II, Macuga, Swartz & Little, Detroit, MI.

For THE CITY OF ALLEN PARK, CITY OF LINCOLN PARK, CITY OF RIVER ROUGE, CITY OF SOUTHGATE, CITY OF TAYLOR, MICHIGAN, Defendants - Appellees: Charles N. Raimi, R. Craig Hupp, Bodman, Longley & Dahling, Detroit, MI.

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* This was originally issued as an "unpublished decision" filed on January 25, 1999. On March 5, 1999, the court designated the opinion as one recommended for full-text publication.

For CITY OF ECORSE, Defendant - Appellee: R. Craig Hupp, Bodman, Longley & Dahling, Detroit, MI.

For THE CITY OF ALLEN PARK, Defendant - Appellee: Kenneth D. Kruse, Allen Park, MI.

For CITY OF ECORSE, Defendant - Appellee: Victor T. Mitea, Taylor, MI.

For CITY OF LINCOLN PARK, Defendant - Appellee: Edward M. Zelenak, Lincoln Park, MI.

For CITY OF RIVER ROUGE, Defendant - Appellee: David A. Bower, River Rouge, MI.

For CITY OF SOUTHGATE, Defendant - Appellee: John F. Gilhool, Southgate, MI.

For CITY OF TAYLOR, MICHIGAN, Defendant - Appellee: Carl B. Downing, Sommers, Schwartz, Silver & Schwartz, Southfield, MI.

JUDGES: BEFORE: NELSON, SILER, and DAUGHTREY, Circuit Judges.

OPINION: PER CURIAM. This class action suit was brought originally in state court by a group of disgruntled taxpayers seeking a refund of taxes paid and an injunction against further taxation by the defendant municipalities, based on the plaintiffs' claim that the defendants lacked authority to levy taxes without the referendum required by a recent amendment to the Michigan state constitution. The defendants removed the action to federal court, on the ground that the taxes in question had been levied pursuant to a federal consent decree entered four years earlier. Because the district court found that it had continuing jurisdiction under the consent decree,

the court denied the plaintiffs' motion to remand to state court and granted summary judgment to the defendants on the merits. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1994, the district court entered a consent decree in an action brought by the State of Michigan and the United States Environmental Protection Agency under the Clean Water Act, 33 U.S.C. §§ 1251 et seq., to remedy illegal discharges of raw sewage and other pollutants into Michigan waterways. Pursuant to that decree, Wayne County and certain down-river communities were directed to make cash contributions to a fund to update wastewater treatment facilities. The decree also effectively provided that communities unable to make the mandated payments would be required to increase taxes in order to meet their assessments. When a number of the municipalities were forced to levy taxes to ensure compliance with the court order, the citizen plaintiffs initiated this suit in Michigan state court for a refund of their increased tax payments and to enjoin further tax collections. The suit, however, was not filed until four years after entry of the consent decree in the federal action and three years after implementation of the actual tax levies. By that time, the renovation projects were 85 percent completed or contracted, and approximately $ 220 million in bonds had already been sold.

The defendant communities successfully removed the suit to federal court, alleging that the subject matter of the state court action was inextricably intertwined with the viability of the district court's 1994 consent decree. The district court granted summary judgment in favor of the defendants on the taxpayers' claims that the tax levies violated provisions of the Michigan constitution, finding (1) that the challenge to the constitutionality of the tax levies was barred by laches, (2)

that the court had inherent power to enforce its judgments, and (3) that the Michigan state constitutional provision invoked by the plaintiffs was not applicable to the tax levies in question, because they were authorized under state statutes that predated the amendment to the state constitution.

ANALYSIS

Before this court, the plaintiffs contend that the district court erred both in denying their motion for remand and in ordering the municipalities to raise taxes without a vote of the citizenry, allegedly in violation of a "tax revolt" provision of the state constitution.

A. Jurisdiction

The district court correctly noted that implementation and enforcement of compliance with the 1994 consent decree gave it continued jurisdiction over the financing agreements that constituted an integral part of the order, citing Vanguards of Cleveland v. City of Cleveland, 23 F.3d 1013, 1018 (6th Cir. 1994). The court further found that the instant suit "poses an imminent threat to the integrity of the Financing Orders because it could adversely affect the financing mechanism in those orders." We agree.

We also agree that the district court correctly invoked 28 U.S.C. § 1651(a), the All Writs Act, which gives federal courts the "authority to remove an otherwise unremovable state court case in order to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." In re Agent Orange Prod. Liab. Litig., 996 F.2d 1425, 1431 (2d Cir. 1993) (internal quotation marks omitted). It follows that the district court did not err in denying the plaintiffs' motion to remand to state court.

B. Application of the Doctrine of Laches

In a detailed and well-reasoned opinion, the district court ordered summary judgment for the defendants on three alternative bases. Because we conclude that the challenge to the consent decree is barred by the doctrine of laches, we find it unnecessary to reach the question of the district court's inherent authority to order the levy of taxes in this case, and we decline to interpret the scope of the Michigan Constitution, an exercise better left to the Michigan state courts.

The doctrine of laches is an equitable principle that bars recovery in circumstances in which a plaintiff's delay in seeking a judicial remedy prejudices a defendant. To prevail, a party invoking this equitable principle "must show that plaintiffs unreasonably delayed in bringing suit and that [defendants] were prejudiced by this delay." Environmental Defense Fund v. Tennessee Valley Auth., 468 F.2d 1164, 1182 (6th Cir. 1972). In this case, the district court found that the plaintiffs had waited to initiate their action until after the municipal bonds to finance the court-ordered sewer project had been authorized, issued, and sold. As noted above, by the time the hearing occurred, the project was 85 percent complete, at a cost of over $ 200 million. The court further found that the plaintiffs had had ample notice of the defendants' intent to implement the consent decree through the financing agreements contained in that order and yet did not file suit until three years after they received their first assessment. Finally, the court found that the defendants were obviously prejudiced by the delay, given the outlay of funds already expended and the near-completeness of the entire project. With this conclusion, we also agree.

CONCLUSION

After a careful review of the briefs and the record in this case, and having had the benefit of oral argument, we are not persuaded that the district court erred in retaining jurisdiction and in deciding that the action was barred by laches. Moreover, because the reasons for dismissing the complaint against the defendants were fully articulated in the district court's opinions, we conclude that the issuance of another detailed opinion is unnecessary to the correct determination of this appeal. We therefore AFFIRM the judgment of the district court, as provided in its order and opinion denying plaintiffs' motion to remand, dated June 9, 1998, and its opinion and order granting defendants' motion for summary judgment of the same date.

GLORIA BYLINSKI, GLORIA BELLMAN, ALLAN COLLINS, DENNIS COATES, DOUGLAS HAMMAR, ROBIN HAMMAR, SANDRA HOLIDAY, STEVEN HOLIDAY, ROBERT JARRELL, ANISE PIERCE, RICHARD PRESSEY, JIMMY SEACRIST, and MOLLY SEACRIST, and all other persons similarly situated, Plaintiffs, v. CITY OF ALLEN PARK, a Michigan municipal corporation, CHARTER TOWNSHIP OF BROWNSTOWN, a Michigan municipal corporation, CITY OF ECORSE, a Michigan municipal corporation, CITY OF LINCOLN PARK, a Michigan municipal corporation, CITY OF RIVER ROUGE, a Michigan municipal corporation, CITY OF ROMULUS, a Michigan municipal corporation, CITY OF SOUTHGATE, a Michigan municipal corporation, CITY OF TAYLOR, a Michigan municipal corporation, Defendants.

Civil Action No. 98-71289

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

June 9, 1998, Decided
June 9, 1998, Filed

COUNSEL: For Plaintiffs: Peter W. Macuga, II, Rene S. Roupinian, Macuga, Swartz and Liddle, Detroit, MI.

For Cities of Allen Park, Ecorse, Lincoln Park, River Rouge, Romulus, Southgate and Taylor, Defendants: R. Craig Hupp, Charles N. Raimi, Bodman, Longley & Dahling, Detroit, MI.

For City of Lincoln Park, Defendant: Edward M. Zelenak, Lincoln Park, MI.

For City of Taylor, Defendant: Patrick B. McCauley, Sommers, Schwartz, Silver & Schwartz, Southfield, MI.

For City of Ecorse, Defendant: Victor T. Mitea, Taylor, MI.

For City of Southgate, Defendant: John F. Gilhool, Southgate, MI.

For City of Allen Park, Defendant: Kenneth D. Kruse, Pagnucco, Kruse & Tamsen, Allen Park, MI.

For City of River Rouge, Defendant: David A. Bower, River Rouge, MI.

JUDGES: John Feikens, United States District Judge.

OPINIONBY: John Feikens

OPINION: OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs Bylinski et al., representative taxpayers in defendant municipalities, bring this action against defendants City of Allen Park et al. to obtain a refund of and to enjoin further collection of property taxes imposed by the municipalities pursuant to a consent decree entered by me on May 12, 1994. United States v. Wayne County, 1994 U.S. Dist. LEXIS 18775, Civil Action No. 87-70992 (E.D. Mich. 1994) ("Wayne County"). The Wayne County consent decree references the structure of the Downriver Sewage Disposal System 1994 Financing Plan and Final Judgment Re: 1994 Court-Ordered Improvements ("Plan"). It is a comprehensive scheme of sewer improvements intended to bring these

defendant municipalities into compliance with the Clean Water Act, 33 U.S.C. §§ 1251 et seq.

In 1987, the United States Environmental Protection Agency (EPA) and the Michigan Department of Natural Resources (now MDEQ) brought the Downriver Sewer Case (Wayne County) against Wayne County, owner and operator of the Wyandotte Wastewater Treatment Plant (WWTP). These regulatory agencies added the local government units of thirteen municipalities served by the WWTP, the Southgate-Wyandotte Relief Drainage District, and the Ecorse Creek Pollution Abatement Drain (collectively the "Downriver Communities") as defendants in an amended complaint. Defendant municipalities in the current case are among the Downriver Communities in Wayne County. n1 The WWTP is operated by Wayne County pursuant to a contract with the Downriver Communities dated March 1, 1962 (as amended from time to time).

The EPA and MDEQ alleged that the WWTP violated the provisions of the Federal Clean Water Act, 33 U.S.C. §§ 1251 et seq., and the Michigan Water Resources Commission Act, M.C.L. §§ 323.1 et seq., and that the wastewater flows from the Downriver Communities were a major contributing factor in the failure of the WWTP to comply with these Acts. The parties engaged in a court-supervised process to study, design, construct, and fund sewer system improvements intended expeditiously to protect public health and to bring WWTP operations into compliance with the mandates of the Federal Clean Water Act and the Michigan Water Resources Commission Act. A monitor and a special master oversaw the process to insure adequate progress toward achieving project goals, and to report to the court.

In resolution of the claims in Wayne County, I entered a Consent Decree (dated February 11, 1994) approving the

agreement between the Wayne County parties. n2 I also entered an order approving the Plan (dated May 12, 1994, effective March 14, 1994). The Plan defines the process by which the improvements constructed pursuant to the Consent Decree will be financed. In paragraph nine of the Wayne County judgment I stated:

> Need for the Improvements. This Court specifically finds, based on its review of applicable law and the Project Plan, that (i) the improvements are needed to comply with the Federal Water Pollution Control Act and Act 245; and (ii) the installation, construction, alteration, improvement and operation of the Downriver Sewage Disposal System, as described with the improvements, have been ordered in accordance with the Consent Decree, Act 320, Act 245, and the Federal Clean Water Act.

In their complaint in this action, plaintiffs falsely stated: "There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in this complaint." Notwithstanding that statement, plaintiffs seek to enjoin defendants' compliance with the Plan. Ignoring the Wayne County order of May 12, 1994 forbidding litigation of this type, and ignoring the provisions of the Consent Decree reserving continuing jurisdiction of this court in all matters pertaining to the Consent Decree, they brought this action in state court. Defendants removed the case to this court. Plaintiffs claim that property taxes imposed by the municipalities to satisfy the mandates in the Plan are illegal and unconstitutional because the mandates in the Plan run counter to the Headlee amendment to the Michigan Constitution in that the taxes imposed by the defendant communities exceed limits set by state law. They contend that

because defendants levy these taxes without the approval of a majority of the qualified voters of the applicable local unit of government, they are not proper levies.

The Headlee amendment states: "Property taxes and other local taxes and state taxation and spending may not be increased above the limitations specified herein without direct voter approval. . . ." MICH. CONST. of 1963, art. 9, § 25 (amended 1978). Article 9, §§ 26-34 of the Michigan Constitution implements the Headlee amendment. The key section states:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. . . .

MICH. CONST. of 1963, art. 9, § 31 (amended 1978).

Plaintiffs seek enforcement of their contentions by summary judgment. Defendants reply that plaintiffs' claims are barred by laches, that the Headlee amendment does not apply because the taxes at issue are levied pursuant to statutes that predate that amendment and are levied pursuant to this court's approval of the Consent Decree, and that this court has inherent power to enforce the Consent Decree and the Plan by ordering these local government units to levy taxes, even if these taxes exceed state statutory or constitutional limits.

Defendants also move for summary judgment. I address defendants' motion for summary judgment first.

II. SUMMARY JUDGMENT STANDARD

Summary judgment must issue when there is no genuine issue as to any material fact, based on the pleadings, depositions, answers to interrogatories, admissions of the parties, and any affidavits. FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Movants have the burden of proving there is no genuine issue of material fact. Id. Once movants meet this burden, nonmovants "must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Where movants bring a motion for summary judgment, although the trial court views the evidence in a light most favorable to nonmovants, Terry Barr Sales Agency, Inc. v. All-Lock Co., 96 F.3d 174, 178 (6th Cir. 1996) (citation omitted), nonmovants must nonetheless present significant probative evidence to support their claim. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). "The mere existence of a scintilla of evidence in support of the [nonmovants'] position will be insufficient; there must be evidence on which the jury could reasonably find for [nonmovants]." Anderson, 477 U.S. at 252.

III. ANALYSIS

Defendants seek summary judgment based on three legal premises: (a) laches; (b) the tax levy is not subject to the provisions of the Headlee amendment because the effective dates of the statutes pursuant to which the levy is imposed predate the effective date of that amendment; and (c) federal courts have inherent power to order local government units to levy taxes to pay their debt obligations, even if those taxes

exceed state statutory or constitutional tax limits. I address this court's inherent power first.

A. Federal court's inherent power to order local government unit to levy tax.

In my approval of the Plan, I ordered the Downriver Communities to pay their share costs in cash. However, the order also stated that in the event any community failed to pay in cash, the Plan provides a procedure by which the community's assessing officer shall assess the judgment payments in accordance with M.C.L. § 600.6093. The defendant municipalities in this case did not pay their share costs in cash. Therefore, under the terms of the Plan pursuant to court order, these communities were obligated to levy taxes to pay their share costs.

In City of Detroit v. City of Highland Park, 878 F. Supp. 87 (E.D. Mich. 1995), I held that a local government tax increase necessitated by a valid federal court judgment is not within the provisions of the Headlee amendment prohibiting unauthorized tax increases. Id. at 89. I also held that "state law cannot prevent a federal judge from enforcing his judgments." Id.

Plaintiffs' entire case relies on the Michigan Court of Appeals' dismissal of these statements in American Axle & Mfg., Inc. v. City of Hamtramck, 227 Mich. App. 135, 143, 575 N.W.2d 296, 299-300 (1997). In American Axle, the City of Hamtramck (Hamtramck) appealed from a Michigan Tax Tribunal order granting summary judgment for American Axle & Manufacturing, Inc. (American) in American's action challenging Hamtramck's tax assessment levied under M.C.L. § 600.6093. The court in American Axle affirmed the trial court's decision and stated that despite the ruling in

Detroit, supra, the lack of analysis of the issue of a judgment levy raising taxes beyond the constitutionally proscribed level, along with the [Detroit] court's dismissal of further analysis with the statement that Michigan law cannot prevent the enforcement of the federal court's judgment, leads us to believe that Detroit should be of little persuasive value in this matter.

American Axle, 227 Mich. App. at 143.

The opinion in American Axle is not controlling and is inapposite. American Axle refers only to decisions and orders made by state courts. That court applied state constitutional limits to the total amount of taxes imposed on property owners, despite its admission that the Headlee amendment did not apply to the statute pursuant to which the additional taxes were imposed. The reasoning in American Axle is erroneous and clearly inapplicable in cases in which local government units impose taxes that exceed state constitutional or statutory limitations, pursuant to federal court orders. American Axle overlooks and disregards federal cases that teach that neither state laws nor state constitutions control a federal court's application or enforcement of federal law. In particular, in its dismissal of the reasoning in Detroit, the court in American Axle failed to address Missouri v. Jenkins, 495 U.S. 33, 109 L. Ed. 2d 31, 110 S. Ct. 1651 (1990).

In Jenkins, state law authorized the Kansas City, Missouri, School District to assess local property taxes only up to $ 1.25 per $ 100 of property valuation unless a majority of the voters in the district approved a higher levy, up to a limit of $ 3.25 per $ 100. The statute stated that the school district could assess a levy higher than $ 3.25 only if two-thirds or more of the voters approved. n3 The United States Supreme Court held that a federal district court could enjoin the

operation of state laws or constitutional provisions that prevented a local government unit from raising property taxes beyond prescribed limits without an electorate vote, and order the local government unit to levy taxes adequate to fund its obligations under a federal court order: "[A] court order directing a local government body to levy its own taxes is plainly a judicial act within the power of a federal court." Jenkins, 495 U.S. at 55 (citing Griffin v. Prince Edward County Sch. Bd., 377 U.S. 218, 233, 12 L. Ed. 2d 256, 84 S. Ct. 1226 (1964)). The Court stated:

> Griffin followed a long and venerable line of cases in which this Court held that federal courts could issue the writ of mandamus to compel local governmental bodies to levy taxes adequate to satisfy their debt obligations. See, e.g., Louisiana ex rel. Hubert v. Mayor and Council of New Orleans, 215 U.S. 170, 54 L. Ed. 144, 30 S. Ct. 40, . . . (1909); Graham v. Folsom, 200 U.S. 248, 50 L. Ed. 464, 26 S. Ct. 245, . . . (1906); Wolff v. New Orleans, 103 U.S. 358, 26 L. Ed. 395, . . . (1881); United States v. New Orleans, 98 U.S. 381, 25 L. Ed. 225,. . . (1879); Heine v. Levee Commissioners, 86 U.S. 655, 19 Wall. 655, 657, 22 L. Ed. 223 (1874); City of Galena v. Amy, 72 U.S. 705, 5 Wall. 705, 18 L. Ed. 560 (1867); Von Hoffman v. City of Quincy, 71 U.S. 535, 4 Wall. 535, 18 L. Ed. 403 (186[6]); Board of Commissioners of Knox County v. Aspinwall, 65 U.S. 376, 24 HOW 376, 16 L. Ed. 735 (1861).

Jenkins, 495 U.S. at 55-56 (emphasis added). Addressing the State's argument that even under these cases "the federal judicial power can go no further than to require local

governments to levy taxes as authorized under state law," the Court disagreed and noted that "this argument was rejected as early as Von Hoffman v. City of Quincy . . . ." Id. at 56; Von Hoffman v. City of Quincy, 71 U.S. 535, 4 Wall. 535, 18 L. Ed. 403 (1866)). Finally, the Court stated, "It is . . . clear that a local government with taxing authority may be ordered to levy taxes in excess of the limit set by state statute where there is reason based in the [United States] Constitution for not observing the statutory limitation." Id. 495 U.S. at 57.

The Consent Decree and orders in Wayne County remedy the defendant municipalities' violation of federal law. In oral argument on the summary judgment motions in this case, plaintiffs' counsel asserted that the Headlee amendment must violate federal law before a federal court may order a Michigan local government unit to impose taxes that exceed the limitations imposed by that amendment. That is not correct. Under Jenkins, when a federal court determines that a local municipality's actions violate a federal statute that is based on provisions of the United States Constitution (in this case defendant municipalities violated the Federal Clean Water Act, 33 U.S.C. §§ 1251 et seq., enacted by Congress empowered by provisions in the Constitution), the court may order a local government unit with taxing authority to levy taxes adequate to satisfy the municipality's debt obligations incurred in complying with federal law, even if the taxes exceed state constitutional and statutory limitations. In other words, Jenkins permits a federal court to enjoin operation of state statutes and constitutional provisions prohibiting a local government unit from levying taxes at a rate above limits set by state law without majority electorate approval. n4 Thus, the defendant municipalities' tax levies are valid and enforceable, even if the Headlee amendment would otherwise apply.

1. Constitutional basis: General health and welfare.

The United States Constitution grants Congress the power to provide for the general welfare of the United States. U.S. Const., art. I, § 8, cl. 1. In H.R. REP. No. 89-215 (1965), the Committee on Public Works, to whom a bill to amend the Federal Water Pollution Control Act (now known as the Clean Water Act, 33 U.S.C. §§ 1251 et seq.) to establish the Federal Water Pollution Control Administration was referred, stated:

> No more important single problem faces this country today than the problem of "good water." Water is our greatest single natural resource. The issue of pure water must be settled now for the benefit not only of this generation but for untold generations to come. The need for good quality water for all of our Nation's uses--public and private--is a paramount one.
>
> * * *
>
> The Committee on Public Works has been fully aware of this basic problem and from this committee came the first legislation that brought into full focus this problem of water pollution and water quality.

H.R. REP. No. 89-215, at 1 (1965) (emphasis added). This states Congress' intention that this Act protect, and improve, the general welfare of the United States. In United States v. Aluminum Co. of Am., 824 F. Supp. 640 (E.D. Tex. 1993), the court notes that "the objective of the [Clean Water Act] is to protect human health, welfare, and the environment, to eliminate the discharge of all pollutants to waters of [**17] the United States, and to restore the chemical, physical, and biological integrity of the Nation's waters." Id. at 645 (citing

33 U.S.C. § 1251(a)). Thus, this court's enforcement of the consent decree to levy taxes to correct water pollution problems pursuant to the provisions of the Clean Water Act (despite a state statutory limitation on taxation) has a Constitutional basis, and is valid under the Missouri v. Jenkins reasoning.

2. Constitutional basis: Commerce Clause.

Congress may use its power under the Commerce Clause to regulate interstate commerce and any matter that might significantly impact on interstate commerce, including pollution of the navigable waters of the United States. U.S. Const., art. I, § 8, cl. 3; See, e.g., United States v. Holland, 373 F. Supp. 665, 671-73 (M.D. Fla. 1974) (stating Congress intended to use the full extent of the commerce power under the Constitution to protect and improve the waters of the United States). One commentator notes that "federal authority under the commerce clause is extensive. Activities can be regulated under the clause because of their effect on interstate commerce." FRANK F. SKILLERN, ENVIRONMENTAL PROTECTION DESKBOOK § 4.04 (2d ed. 1995). This includes activities resulting in pollution of the waters of the United States, such pollution having an effect on, or the potential to effect, interstate commerce. Congress' commerce power is another Constitutional basis for this court's enforcement of a local government unit tax levy to satisfy the mandates of the Clean Water Act, despite state statutory or constitutional limitations on taxation.

B. Laches.

Plaintiffs' claims are also barred by laches. "To demonstrate laches, a party must establish '(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" Apache Survival

Coalition v. United States, 21 F.3d 895, 905 (9th Cir. 1994) (quoting Costello v. United States, 365 U.S. 265, 282, 5 L. Ed. 2d 551, 81 S. Ct. 534 (1961)); S.E.R., Jobs For Progress, Inc. v. United States, 759 F.2d 1, 5 (Fed. Cir. 1985); Environmental Defense Fund v. Tennessee Valley Auth., 468 F.2d 1164, 1182 (6th Cir. 1972) (stating: "To prevail, appellants must show that plaintiffs unreasonably delayed in bringing suit and that appellants were prejudiced by this delay. . . ."). "The application of the laches doctrine is within the sound discretion of the district court." Azalea Fleet, Inc. v. Dreyfus Supply & Mach. Corp., 782 F.2d 1455, 1458 (8th Cir. 1986) (citing Gardner v. Panama R.R., 342 U.S. 29, 30, 96 L. Ed. 31, 72 S. Ct. 12 (1951)).

Here, defendants correctly assert that plaintiffs waited to institute their suit until after bonds had been issued and sold. Indeed, the project addressed by the Wayne County consent decree and related orders is 85% compete. Through publication and public hearings, plaintiffs had ample notice of defendants' intentions to finance the project through bond sales. Yet plaintiffs did not bring this suit until three years after first being assessed for the cost of the sewer and waste water treatment improvements, after more than $ 220 million in bonds had been sold, and after the improvement project was 85% completed. Plaintiffs' delay clearly prejudices defendant municipalities. For this reason, it is inequitable to enforce plaintiffs' claims against defendants; they are barred by laches.

Notably, although Michigan law does not control in this action, it does apply to plaintiffs' Headlee amendment claim and is consistent with federal case law. Michigan law states that where a plaintiffs claims are untimely, a court may "refuse to adjudicate on the merits the claims set forth in the complaint." Eby v. Lansing Bd. of Water & Light, 417 Mich. 297, 306 n.10, 336 N.W.2d 205 (1983) (citing Bigger v. City

of Pontiac, 390 Mich. 1, 210 N.W.2d 1 (1973)). The doctrine of laches is an equitable principle that bars recovery in circumstances in which a plaintiff's delay in seeking judicial remedy prejudices a defendant. "Laches is not the mere passage of time, but is rather the passage of time combined with a change in condition which would make it inequitable to enforce a claim against the defendant." Tray v. Whitney, 35 Mich. App. 529, 536, 192 N.W.2d 628 (1971). However, statutes of limitation may apply by analogy to equitable claims. Taxpayers Allied for Constitutional Taxation v. Wayne County, 450 Mich. 119, 127 n.9, 537 N.W.2d 596 (1995).

Michigan courts have applied the laches doctrine to bar Headlee claims. See Bigger v. City of Pontiac, 390 Mich. 1, 4-5, 210 N.W.2d 1 (1973) (stating that in cases holding that in the financing of public projects by municipalities, if objecting plaintiffs do not resort to the courts "within the context of the time available for adjudication" and without delay, courts may refuse to hear the cases); Sessa v. Macomb County, 220 Mich. App. 279, 286-88, 559 N.W.2d 70 (1996) (stating that even though plaintiffs brought suit within an applicable one year statute of limitations pursuant to M.C.L. § 600.308a(3), identical to the statute of limitations for Headlee-type claims, the suit was barred by laches). As interpreted by the court in Sessa, the preclusive doctrine of laches, detailed in Bigger, 390 Mich. at 4-5, "is designed to deal with challenges that could prevent or frustrate public improvements in general." Sessa, 220 Mich. App. at 286. The court in Sessa also noted:

> An equally important aspect of the Bigger rule comes into play here where suit was not begun until after the bonds had been issued and sold on the open market. The interests of third parties, the bondholders, who are bona fide

> purchasers for value and who, at the time of purchase, were not on notice of any such challenge, represents a vested interest that the entertaining of such litigation on its merits could defeat. In this regard, therefore, the Bigger rule is distinct from the statute of limitations and simply obligates those who would challenge such action to move promptly.

Sessa, 220 Mich. App. at 287 (citing Walled Lake Consol. Sch. Dist. v. Commerce Charter Township, 174 Mich. App. 434, 436-37, 437 N.W.2d 16 (1989)) (emphasis in original).

Sessa noted that although the Bigger rule predates the 1978 Headlee amendment to the Michigan constitution, it is not undermined by that amendment.

> Nothing in the text of Const 1963, art 9, §§ 25-34 addresses the Bigger principle or purports to limit or abolish it in taxpayers [sic] suits authorized by Const 1963, art 9, § 32 [the standing/enforcement provision]. The Legislature has carefully protected taxpayer interest in this regard, however, in fulfillment of the mandate of Const 1963, art 9, § 34, by requiring notice of intent to bond to be published, MCL 123.958b(3); MSA 5.301(8b)(3).

Sessa, 220 Mich. App. at 287. Bigger applies even if plaintiff's claim is legal rather than equitable.

That plaintiff couches part of its claim as legal rather than equitable does not distinguish this case from Bigger. The import of Bigger is that where a plaintiff seeks to employ the

judicial process to challenge a project duly adopted by the appropriate government officials, it must do so in a timely manner. . . . In this instance, waiting for two years to enjoin the plan's proposed method of collecting revenue or to compel the payment of revenue to plaintiff is not justified.

Walled Lake Consol. Sch. Dist., 174 Mich. App. at 438. Thus, both Federal and Michigan laches doctrine bar plaintiffs' claims.

C. Tax levy not subject to the provisions of the Headlee amendment.

When laches prevents a suit, the court need not consider constitutional challenges in that case. Thatcher Enterprises v. Cache County Corp., 902 F.2d 1472, 1475-76 (10th Cir. 1990) (stating that because plaintiffs waited seventeen years from the time they should have known, and nine years from the time they actually knew, of the County's actions to make challenges to a zoning ordinance, plaintiffs' constitutional challenges were barred by laches); Peter Henderson Oil Co. v. City of Port Arthur, Texas, 806 F.2d 1273, 1275 (5th Cir. 1987) (stating that because appellants waited over five years after the cause of action arose to challenge an unconstitutional delegation, the challenge was barred by laches); see also Edel v. Filer Township, 49 Mich. App. 210, 211 N.W.2d 547 (1973). I nevertheless address plaintiffs' constitutional (Headlee amendment) challenges under Michigan law. n5

In oral argument, plaintiffs' counsel began with a misinterpretation of the Headlee amendment, stating that "Michigan law is clear, at section thirty-one of the Headlee amendment to [the] Michigan Constitution, that any tax not in existence on November 7th, 1978, or authorized to exist by ordinance or statute is unconstitutional if not approved by the

people before imposition and collection." A correct reading of the Headlee amendment, MICH. CONST. art. 9, § 31 (ratified Nov. 7, 1978, effective Dec. 23, 1978), is that it prohibits local government units from levying any tax not authorized by law or charter, and from increasing the rate of an existing tax above that rate authorized by law or charter, existing when the amendment was ratified, without approval of a majority of the electorate of that local government by vote.

The Headlee amendment "does not apply to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments on contract obligations in anticipation of which bonds are issued which were authorized prior to the effective date of this amendment." MICH. CONST. art. 9, § 31. The requirement that the tax be authorized by law or charter requires only that "a local government be empowered to levy the tax on the date that the Headlee Amendment was ratified, even if the local government had not exercised its authority." Bailey v. Muskegon County Bd. of Comm'rs. 122 Mich. App. 808, 821, 333 N.W.2d 144 (1983) (emphasis in original).

If Michigan law controlled in this case, the Headlee amendment would still not apply to the taxes levied because the levies are authorized by Act 320 (the Court Order Bond Act), amended and recodified as M.C.L. § 324.4307, and Act 326 (the Judgment Levy Act), amended and codified as M.C.L. § 600.6093. Both statutes were in effect before ratification of the Headlee amendment. The 1994 Financing Order and Final Judgment Plan and Consent Decree in the Wayne County case make explicit reference to these statutes.

1. Act 320 (M.C.L. § 324.4307) predates the Headlee amendment.

The Headlee amendment does not apply because Act 320 predates it. The Court Order Bond Act (Act 320), M.C.L. § 324.4307, was originally enacted in 1927, long before ratification of the Headlee amendment. M.C.L. § 324.4307 empowers the defendants in this case to levy taxes for the purposes enumerated in the Wayne County 1994 Financing Plan and Final Judgment (sewage system and water treatment facilities construction, improvements, and operation). That defendants did not actually levy taxes until some date after ratification of the Headlee amendment is irrelevant.

Defendant municipalities were authorized by law to impose such a tax prior to ratification of that amendment. Thus, by the terms of both the Headlee amendment and M.C.L. § 324.4307 the taxes levied in this case are not subject to Headlee amendment restrictions.

The tax assessments levied against property owners in the defendant municipalities are imposed pursuant to Act 320. The Plan and Consent Decree make explicit reference to Act 320 as a statute pursuant to which the taxes at issue would be imposed:

The Court may enter as required an order pursuant to said Act 320 regarding the terms and conditions of the contracts, bonds and other documents to be executed and delivered by the legislative bodies of Defendant in accordance with this paragraph, provided such order in no way alters, modifies, or conflicts with the deadlines, obligations, or items set forth in this Decree or set forth by applicable federal or state law.

Wayne County Consent Decree, Section XIV, Funding P 49 (emphasis added). The Wayne County and Downriver Communities financing resolutions reference this statute. "WHEREAS, Wayne [County] proposes to authorize the issuance of the Bonds, pursuant to Act 320 in anticipation of

and secured payments by the Judgment payments . . . and other things necessary to the authorization [**28] and issuance of the Bonds under Act 320 having been provided for . . . ." Wayne County Resolution 94-81, pp. 3-4 (February 17, 1994).

Act 320, M.C.L. § 324.4307, permits local government units to issue and sell the necessary bonds to fund "construction, installation, alteration, operation, or improvement, including the treatment works, and other facilities" of a "sewage system, solid waste facility, or waterworks system." M.C.L. § 324.4307(1).

The amount of the bonds either issued or outstanding shall not be included in the amount of bonds which the local unit or units of government are authorized to issue under any statutes of this state or charters. Local units of government issuing bonds under this section may raise a sum annually by taxation as the legislative body or respective legislative bodies consider necessary to pay interest on the bonds, and to pay the principal as it falls due. The annual amount may be in excess of the authorized annual tax rate fixed by the statutes or charters.

M.C.L. § 324.4307(1) (emphasis added). This section also states: "Court ordered bonds do not require approval of the electors . . . . Bonds other than court ordered bonds issued under this part require approval of the electors at a general or special election only if an appropriate petition is filed in accordance with the law." M.C.L. § 324.4307(2). Thus, not only is the funding scheme in the Consent Decree authorized by this statute, it is also specifically exempted from Headlee amendment requirements. Voter approval is not required under circumstances in which local government units, pursuant to court order and this statute, issued and sold bonds

to fund sewage and water works system improvements to effectuate compliance with federal law.

2. Act 236 (M.C.L. § 600.6093) predates the Headlee amendment.

The Headlee amendment does not apply because Act 236 predates it. The Judgment Levy Statute, Act 236, originally enacted in 1963, and later amended, empowers municipalities to assess taxes necessary to pay judgments against the municipalities or officers of the municipalities in their name of office. M.C.L. § 600.6093. The statute predates the Headlee amendment, and therefore is not controlled by the restrictions of that amendment. See City of Detroit v. City of Highland Park, 878 F. Supp. 87, 89 (E.D. Mich. 1995).

Bailey v. Muskegon County Bd. of Comm'rs, 122 Mich. App. 808, 821, 333 N.W.2d 144 (1983), supports exemption of this statute from the Headlee amendment requiring electorate approval. "The Headlee Amendment imposes specific limitations on the authority to impose additional taxes without voter approval. It does not require voter approval of increased tax levies where the authority to make the levy has already been approved." Smith v. Scio Township, 173 Mich. App. 381, 388, 433 N.W.2d 855 (1988) (citing Bailey). As discussed in section III(A), supra, federal law overrides state law in the instant case, and supports the defendant municipalities' imposition of taxes that exceed Michigan constitutional limitations, in compliance with my orders. However, even if Michigan law applied, because the taxes levied pursuant to the Wayne County 1994 Financing Plan and Final Judgment were levied pursuant to statutes enacted prior to ratification of the Headlee amendment, those tax levies are not subject to voter approval or other limitations imposed by that amendment, and plaintiffs' claim must be denied.

The Plan specifically refers to Act 236 as a statute authorizing the imposition of taxes on property owners in resolution of the defendant municipalities' debt obligations as determined in Wayne County:

> With respect to any Downriver Community that does not pay its Judgment Payment . . . in cash prior to the closing date for the sale of Wayne's bonds a certified copy of this 1994 Financing Plan and Final Judgment shall be filed with the assessing officer of each Downriver Community that is a city . . . pursuant to Section 6093 of Act 236. . . and this 1994 Financing Plan and Final Judgment.

Wayne County 1994 Financing Plan and Final Judgment, P 8, p. 12.

In oral argument plaintiffs' counsel asserted that my order pursuant to Act 320 and Act 236 must be minimally intrusive. In Wayne County I did this when I ordered the municipalities to pay their share costs in cash. I did not restrict the methods by which they might procure this cash. I could not have given a less intrusive order.

My order directing defendant municipalities to levy taxes to pay their costs became effective only if they did not pay their share costs in cash. Although plaintiffs' assertions implicitly assume that I could not order the levy of taxes until after an actual violation of the minimally intrusive order, nowhere in Jenkins does the Supreme Court state that a federal court must wait until a local government unit violates its minimally intrusive orders to delineate contingent orders to enforce its judgment. See Missouri v. Jenkins, 495 U.S. 33, 109 L. Ed. 2d 31, 110 S. Ct. 1651 (1990).

CONCLUSION

Defendants are entitled to summary judgment on three legal premises: (a) the inherent power of federal courts to order local government units to levy taxes to pay their debt obligations, to carry out federal court ordered and approved consent decrees and their financing plans, even if those taxes exceed state statutory or constitutional tax limits; (b) laches; and (c) inapplicability of the Headlee amendment.

IT IS SO ORDERED.

John Feikens

United States District Judge

Dated: June 9, 1998

GLORIA BYLINSKI, GLORIA BELLMAN, ALLAN COLLINS, DENNIS COATES, DOUGLAS HAMMAR, ROBIN HAMMAR, SANDRA HOLIDAY, STEVEN HOLIDAY, ROBERT JARRELL, ANISE PIERCE, RICHARD PRESSEY, JIMMY SEACRIST, and MOLLY SEACRIST, and all other persons similarly situated, Plaintiffs, v. CITY OF ALLEN PARK, a Michigan municipal corporation, CHARTER TOWNSHIP OF BROWNSTOWN, a Michigan municipal corporation, CITY OF ECORSE, a Michigan municipal corporation, CITY OF LINCOLN PARK, a Michigan municipal corporation, CITY OF RIVER ROUGE, a Michigan municipal corporation, CITY OF ROMULUS, a Michigan municipal corporation, CITY OF SOUTHGATE, a Michigan municipal corporation, CITY OF TAYLOR, a Michigan municipal corporation, Defendants.

Civil Action No. 98-71289

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Filed: June 9, 998

OPINION AND ORDER

DENYING PLAINTIFFS' MOTION TO REMAND

I. INTRODUCTION

Plaintiffs Blinks et al., representative taxpayers in defendant municipalities, bring this action against defendants City of Allen Park et *al.* to obtain a refund of and to enjoin further collection of property taxes imposed by the

municipalities pursuant to a consent decree entered by moon May 12, 1994. *United States v. Wayne County,* Civil Action No, 87-70992 (E.D. Mich 1994) *(Wayne County).* The *Wayne County* consent decree references the *Downriver Sewage Disposal System 1994 Financing Plan and Final Judgment Re: 1994 Court Ordered improvements* (Plan). The Plan is part of a comprehensive scheme *of sewer* improvements intended to bring the defendant municipalities into compliance with the Clean Water Act, 33

U.S.C. §§ 1251 *et seq.*

Before me is plaintiffs' motion to remand this case to the Wayne County Circuit Court. This opinion supplements my findings in the hearing on this motion,

II. ANALYSIS

As stated in defendants' brief in opposition to plaintiffs' motion to remand, implementation and enforcement of compliance with the 1994 Financing Order and Final Judgment entered by this court in *Wayne County* are within this court's continued jurisdiction and supervision. The United States Court of Appeals for the Sixth Circuit stated:

> Once approved, the prospective provisions of the consent decree operate as an injunction The injunctive quality of a consent decree compels the approving court to: (1) retain jurisdiction over the decree during the term of its existence, (2) protect the integrity of the decree with its contempt powers, and (3) modify the decree if "changed circumstances" subvert its intended purpose. [I] is well settled that "courts retain the inherent power to enforce

agreements entered into in settlement of litigation pending before them."

Vanguards of Cleveland v. City of Cleveland, 23 F.3d 1013, 1018 (6th Cir. 1994) (citations omitted) (emphasis added), Defendants correctly assert that this suit poses an imminent threat to the integrity of the Financing Orders because it could adversely affect the financing mechanism in those orders. I appropriately retain jurisdiction of any matters that might affect the *Wayne*

County consent decree and its implementation.

My jurisdiction is also appropriate under the All Writs Act, 28 U.S.C. § 1651(a), which gives federal courts the "authority to remove an otherwise unremovable state court case in order to 'effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *In reAgent Orange Product Liability Litigation,* 996 F.2d 1425, 1431 (2d Cir. 1993) (citations omitted),

CONCLUSION

For the reasons stated herein and in the hearing on the motion, plaintiffs' motion to remand is denied.

IT IS SO ORDERED.

_____

John Feikens
United States District Judge

Dated: 6/9/98

Supreme Court, U.S.
FILED
JUN 1 1999
OFFICE OF THE CLERK

No. 98-1734

In the

Supreme Court of the United States

October Term, 1998

GLORIA BYLINSKI, GLORIA BELLMAN, ALLAN COLLINS, DENNIS COATES, DOUGLAS HAMMAR, ROBIN HAMMAR, SANDRA HOLIDAY, STEVEN HOLIDAY, ROBERT JARRELL, ANISE PIERCE, RICHARD PRESSEY, JIMMY SEACRIST, and MOLLY SEACRIST, and all other persons similarly situated,

Petitioners,

-v-

CITY OF ALLEN PARK, a Michigan municipal corporation, CHARTER TOWNSHIP OF BROWNSTOWN, a Michigan municipal corporation, CITY OF ECORSE, a Michigan municipal corporation, CITY OF LINCOLN PARK, a Michigan municipal corporation, CITY OF RIVER ROUGE, a Michigan municipal corporation, CITY OF ROMULUS, a Michigan municipal corporation, CITY OF SOUTHGATE, a Michigan municipal corporation, CITY OF TAYLOR, a Michigan municipal corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Although Petitioners assert that the facts of this case are "simple" and "undisputed," their Statement of the Case omits material facts and includes a mischaracterizations of Petitioners' legal posture in this Court. Further, a proper understanding of the decisions in the courts below depends upon understanding the nature and purpose of two orders issued by the federal district court in a related underlying case. Consequently, Respondents will add the necessary factual context omitted in the Petition.

Petitioners reside in the communities governed by Respondents in Wayne County, which is located in southeastern Michigan. Respondents own and operate sewage and storm drainage systems and have a contract with the government of Wayne County under which Wayne County's operates a wastewater treatment plant to process the sewage and storm drainage from Respondents and other communities and units of local government.

A. The Underlying Clean Water Act Enforcement Suit Resulted in Specific Court Orders to Respondents

In 1987, in the United States District Court for the Eastern District of Michigan, the United States Environmental Protection Agency (USEPA) and the Michigan Department of Natural Resources (MDNR) sued Wayne County, Respondents, and the other units of government who owned, operated or used the wastewater treatment plant, alleging that the defendants violated the Clean Water Act, 33 U.S.C. §§ 1301, *et seq.*, and Michigan environmental law, Mich. Comp. L. §§ 324.3101, *et seq.* (known as "Act 245"), by discharging pollutants into a

navigable stream known as Ecorse Creek, either as direct discharges or as untreated overflows from the treatment plant. The case, captioned *United States v. Wayne County*, No. 87-CV-70992, was assigned to the Honorable John Feikens.

The Clean Water Act prohibits discharges to navigable waters of the United States without a National Pollutant Discharge Elimination System Permit (NPDES Permit). 33 U.S.C. §1311. The United States may bring an enforcement action against those who discharge without a permit and seek civil and criminal penalties against negligent and intentional discharges. 33 U.S.C. §1319. The Clean Water Act also provides that the district court "shall have jurisdiction to restrain such violations and to require compliance." 33 U.S.C. §1319(b). Michigan environmental law includes similar provisions. Mich. Comp. L. § 324.3115.

In particular, the plaintiffs in *United States v. Wayne County* alleged that the defendants had discharged pollutants in excess of the limits imposed by an NPDES Permit issued to Wayne County. USEPA and MDNR also alleged that the operation of the wastewater treatment plant violated state law and that individual community's sewer systems occasionally discharged into Ecorse Creek without an NPDES Permit.

The defendants to *United States v. Wayne County* did not dispute that the plant violated its NPDES Permit or that there were unpermitted sewer and stormwater discharges on occasion into Ecorse Creek. Under the supervision of the district court, they engaged in a process to study, plan, design, construct, and finance sewer and drainage system improvements that would bring the plant, as well as the sewer systems that it served into compliance with federal and state law. As part of this process, in 1993, an environmental

consultant filed a report and plan with the district court (1993 Project Plan). That plan specifically identified sources of illegal discharges and documented violations of the plant's NPDES Permit. It created a plan and a construction schedule to bring the plant and its associated sewer systems into compliance with federal and state law. The parties and the district court accepted the factual findings made in the 1993 Project Plan, thereby conceding all of the requisite elements for violations of 33 U.S.C. § 1319, and Mich. Comp. L. § 324.3115.

In February 1994, the district court lodged a Consent Decree (entered in May, 1994), Resp. App., p. 21b, which required that the parties adopt the 1993 Project Plan, set pollution limits for the discharge of effluents during the interim when the treatment plant and sewer improvement projects (Improvements) were under construction, and established penalties for failure to comply with the construction schedule to achieve full compliance with federal and state law. The Consent Decree ordered Respondents and the other defendants to carry out the 1993 Project Plan.

Although, as in the case of all consent decrees, the parties "voluntarily" executed the agreement, to describe the Consent Decree as "voluntary" or a private contractual undertaking, is not consistent with the facts of *United States v. Wayne County*. The defendants, including Respondents, engaged in years of litigation, eventually admitting facts supporting criminal and civil sanctions under the Clean Water Act. The Consent Decree, at ¶ 26, Resp. App., p. 56b, imposed a $413,000 civil penalty. Throughout this long period of litigation, the district court was deeply involved in forcing the parties through the complex process of achieving compliance with federal law. The Consent Decree was not a

device for avoiding a judicial process that would lead to findings of liability for violating federal law; it was the culmination of a judicial process determining that federal and state law had been violated.

In March 1994, the district court entered a Financing Plan and Final Judgment (Final Judgment). Resp. App., p. 1b. The Final Judgment, Resp. App., p.3b, found that:

> "* * * it is immediately necessary and imperative for the public health and welfare of the present and future residents of Wayne and the Downriver Communities that the improvements for the [wastewater treatment] System required by the Consent Decree and the Project Plan (the 'Improvements') be planned, designed, acquired, constructed and financed to service the Downriver Communities, as a part of the System * * *."

The Final Judgment, Resp. App., p. 13b, also stated:

> "9. Need for the improvements.
>
> "This Court specifically finds, based on its review of the applicable law and the Project Plan, that (i) the Improvements are needed to comply with the Federal Water Pollution Control Act[1] and Act 245; and (ii) the installation, construction, alteration,

---

1 The Clean Water Act amended the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.*, by adding sections which are codified at 33 U.S.C. §§ 1301, *et seq.*

> improvement and operation of the Downriver Sewage Disposal System, as described with the Improvements, have been ordered in accordance with the Consent Decree, Act 320, Act 245 and the Federal Clean Water Act." (Footnote added.)

Thus, in making its findings of fact in its Final Judgment, the district court determined that Wayne County and Respondents, among others, had violated federal and state environmental law, although the district court did not use language of "liability" in its order. As noted, the district court had imposed a $413,000 penalty in the Consent Decree.

The Final Judgment ordered Wayne County to act as the agent for Respondents to supply the planning, design, acquisition and construction of the sewer improvements. This was done for several reasons. Wayne County has a large public works department capable of carrying out the $250 million project, the improvements included projects spanning several communities, and Wayne County has access to bond financing which the individual communities do not have.

At the time of the Final Judgment in 1994, the parties to the *Wayne County* case estimated that the cost of the improvements would be $230,000,000. According to current estimates, the cost now is $250,000,000. On behalf of Respondents and the other defendants/judgment debtors under the Final Judgment, Wayne County obtains bond financing for the improvements in the 1993 Project Plan through the Michigan Water Pollution Control Revolving Loan Fund, which provides opportunities for pooled bond financing at advantageous rates, made possible by federal subsidies. The capital costs for the improvements are paid on

an ongoing basis, with Wayne County issuing new bonds each year to pay for those improvements scheduled for the following year. The first bonds were sold in 1994.

The Final Judgment, ¶ 8, Resp. App., p. 8b, provides that "[e]ach Downriver Community is hereby ordered to pay its portion of the local-share costs of the Improvement . . . ." This payment is made though a process of annual assessments by Wayne County to recover each Respondent's share of annual bond payments. *Id.* Each Respondent pays a different amount based on the projects constructed in its community and the Respondent's contributions to sewer flows and overflows. *Id.* Each year, after Wayne County determines the cost of upcoming improvements and calculates the share of such cost for each Respondent, Respondents hold public hearings at which Wayne County's determinations are reviewed. Once the costs and construction schedule are finalized, the district court issues a supplementary order to the Final Judgment ordering each community to pay its share. To date, the district court has issued twelve supplementary orders. The improvements are more than 85% complete.

The Final Judgment specifically provides that the defendants are free to choose how to raise the payments which the Final Judgment requires. Final Judgment, ¶11, Resp. App., p. 15b. The Final Judgment, ¶ 8, Resp. App., p. 7b-8b, directs each community to pay its share in cash.

The Final Judgment contains an enforcement mechanism if the voluntary payments in cash are not made. At ¶¶ 8(a) to 8(c), Resp. App., pp. 8b to 12b, the Final Judgment orders that if a community fails to pay cash when due, an assessment must be made against the property in community on behalf of

Wayne County pursuant to Mich.Comp. L. § 600.6093, Resp. App., p. 85b, (providing that a local tax assessor must levy taxes to the extent necessary to satisfy judgments against the local government) (known as the Judgment Levy Act). That statute provides the sole means under Michigan law enforce a judgment against a municipality. *Roosevelt Park v. Norton Twp.*, 330 Mich. 270, 47 N.W.2d 605 (1951).

Petitioners suggest that the Final Judgment encourages the violation of the Headlee Amendment and reflects the district court's disregard for state law and contains an express intent to violate Michigan tax limits. In this connection, it is worth noting that several of the defendants in *Wayne County* have paid their assessments in cash when due and a court-ordered assessment was not required. Hence, the Final Judgment, whatever it else it does, does not require the judgment be paid by assessments against property. The court-ordered assessment is thus a last resort enforcement mechanism for the benefit of the district court, plaintiffs, Wayne County and the general public because it provides an enforceable means to obtain funds to cure violations of federal law if a defendant community fails to pay its share voluntarily. The language cited by Petitioners which supposedly identifies an intent to violate Michigan tax law, Petition, p. 4, was a waiver by the defendant communities of their right to make a separate challenge to any court-ordered assessment and nothing more.

Enforcement of Final Judgment thus may require in some circumstances the assessment of local property taxes, and that enforcement mechanism has been used with regard to Respondents here. Such property assessments may implicate Michigan law. Under the Michigan Constitution, municipal government has limited authority to raise property tax rates.

According to Art. 9, Secs. 6 and 31 of the Michigan Constitution as amended by the "Headlee Amendment," Resp. App., p. 90b, and p.92b, respectively, no municipality may levy taxes above a specified millage limit without a vote of the electors *unless* the authority to levy the tax was granted by statute *before* the Headlee Amendment was enacted in November 1978.

In ordering an assessment to enforce payment if voluntary payment was not forthcoming, Judge Feikens relied on (in part) two Michigan statutes passed many years before the Headlee Amendment was adopted. Mich. Comp. L. § 324.4307 (providing that local units of government may impose taxes beyond limits of their taxing authority as established by statute or charter for the purpose of funding bonds that are used to pay for court-approved improvements to sewage systems) (known as the Court Order Bond Act, Resp. App., p. 88b; and Mich. Comp. L. § 600.6093 (the Judgment Levy Act discussed above).

In 1994, when the district court in *United States v. Wayne County* entered its orders, every decision in federal and state court addressing the Headlee Amendment's "grandfather" clause had held that the clause's interpretation depended upon its plain language: if the statute authorizing the challenged tax predated the Headlee Amendment, the tax was not subject to the Headlee Amendment's millage election requirement. *See, e.g., City of Detroit v. City of Highland Park*, 878 F. Supp. 87 (E.D. Mich. 1995); *Taxpayers United v. City of Detroit*, 196 Mich. App. 463, 493 N.W.2d 463 (1992); *Smith v. Scio Twp.*, 173 Mich. App. 381, 433 N.W.2d 855 (1988); *Bailey v. Muskegon Cty. Bd. of Comm'rs*, 122 Mich. App. 808, 333 N.W.2d 144 (1983). In 1997, three years after the entry of the Final Judgment, a Michigan court made the first

and so far only departure from this interpretation of the Headlee Amendment. In *American Axle & Mfg., Inc. v. City of Hamtramck*, 227 Mich. App. 135, 575 N.W.2d 296 (1997), the Michigan Court of Appeals adopted a radically different interpretation of the Headlee Amendment, holding that the grandfather clause in the Headlee Amendment applied to the tax levy itself, not to the statute authorizing the tax levy. That decision cannot be "backdated" to support Petitioners' claims that the Final Judgment contradicted Michigan law when it was entered. Further, Judge Feikens considered whether *American Axle* was correctly decided as a matter of Michigan law and found it was not, which finding is not appealed here. The district court was not and is not required to follow *American Axle* because a federal court is not bound by an intermediate state court's ruling on state-law issues. Rather, it must determine how the highest court in a state would resolve the issue if presented with it. *Garden City Osteopathic Hosp. v. HBE Corp.*, 55 F.3d 1126, 1130 (6th Cir. 1995). The Michigan Supreme Court granted discretionary review to consider the legality of the *American Axle* opinion. *American Axle & Mfg., Inc. v. City of Hamtramck*, leave to appeal granted, 459 Mich. 939, 590 N.W.2d 65 (1999).

Finally, as a part of the Final Judgment, the district court enjoined any party from conducting any kind of proceeding that would interfere with the implementation of its orders. That injunction has never been enforced against any person. This suit has proceeded because neither Respondents have moved for nor has the district court considered *sua sponte*, staying this suit pursuant to the injunction on the Final Judgment.

B. Petitioners' Complaint Requested the State Circuit Court Enjoin the Respondents' Assessors' Compliance with the Final Judgment's Order That Real Property in a Respondent's Community Be Assessed If Respondent Failed to Pay Voluntarily its Share of the 1993 Project Plan.

On March 4, 1998, Petitioners filed this case in the Circuit Court for Wayne County, Michigan, alleging that Respondents had violated Michigan law by levying assessments in compliance with the Final Judgment. Petitioners sought a refund of all taxes paid in excess of those limits as well an injunction preventing Respondents from continuing to levy any assessments pursuant to the ¶8 (a) to (c) of the Final Judgment. Petitioners specifically alleged the following:

> "1. This matter is necessary to ... enjoin the imposition and further collection from Plaintiffs by way of an illegal and unconstitutional property tax assessment of a March 14, 1994 judgment [i.e., the final Judgment]. . . . "
>
> * * * *
>
> "23. On March 14, 1994, Judge District Court Judge John Feikens entered judgment against Defendants imposing upon Defendants a portion of the costs of [the] Improvements . . . "
>
> * * * *

> "24. On or about 1995 Defendants began assessing the costs of the judgment against Plaintiffs by placing on Plaintiffs' respective real and personal property tax bills a tax described as 'EPA Judgment' . . . ."

Class Action Complaint and Jury Demand, ¶¶ 1, 23 and 24, Resp. App., pp.77b, 78b, 81b, 82b.

Petitioners did fail to mention in their pleading that the tax objected to was specifically ordered by ¶¶8(a)- (c) of the Final Judgment.

C. Procedural History

Respondents removed this case to the district court, where it was assigned to Judge Feikens. Petitioners moved to remand the case and for the recusal of Judge Feikens. The district court denied both motions.

Thereafter, Respondents moved for summary judgment on three grounds: that (1) as a matter of federal law, federal district courts could, in the limited circumstances of this case, override state law to compel compliance with federal law; (2) as a matter of Michigan law, Respondents had not violated the Headlee Amendment because the taxes they levied to satisfy their obligations under the Financing Plan and Final Judgment were authorized by both the Court Order Bond Act and the Judgment Levy Act before the Headlee Amendment was passed; and (3) in any event, Petitioners' suit was barred by laches. The district court granted the motion and dismissed the case giving as alternative grounds all three of Respondents' legal arguments as grounds for dismissal.

Bylinski v. City of Allen Park, 8 F. Supp. 2d 965 (E.D. Mich. 1998).

Petitioners appealed the denial of their motion to remand and the grant of summary judgment. The Sixth Circuit affirmed the district court's rulings, holding that the district court had removal jurisdiction by virtue of its continuing jurisdiction in the *Wayne County* case and under the All Writs Act, 28 U.S.C. §1651. With respect to the merits, it held that Petitioners' suit was barred by laches.

D. Petitioners Have Mischaracterized Their Posture on Appeal to Obtain Favorable Action on Their Petition

Here Petitioners take the anomalous position of challenging the removal of this case to federal court while abandoning any appeal of the adverse rulings on the substantive merits of their case. Thus Petitioners have conceded that the Sixth Circuit was right on the merits. In making this concession, they have also effectively conceded that the district court was right on the merits as well, including its holding that the subject assessment is permitted under state law and does not violate the Headlee Amendment.

Yet, throughout their Petition, Petitioners argue that the judgment assessment at issue was unconstitutional under Michigan law. Although they have abandoned that argument, they improperly urge this Court to consider that argument in deciding to grant their Petition. The removal issue raised by Petitioners must be decided on its own merits alone, not in light of underlying state constitutional issues that Petitioners abandoned.

Reasons for Denying the Petition

The district court held that 28 U.S.C. § 1651 and 28 U.S.C. § 1331 were proper bases for removal. It also held that Respondents were entitled to summary judgment because: (1) the district court in the *Wayne County* case had the authority to enter appropriate orders to effect its judgment; (2) in complying with the Final Judgment, Respondents had not violated the Headlee Amendment to the Michigan Constitution; and (3) Petitioners' claims were barred by laches because they waited until long after the bonds were sold to challenge the financing plan in the Final Judgment.

The Sixth Circuit affirmed the district court's decisions with respect to removal and laches, but did not address any questions of Michigan law. Petitioners have challenged only the jurisdictional ruling of the Sixth Circuit and have not appealed the rulings on the substantive issues.

I. THIS COURT SHOULD DENY THE PETITION BECAUSE THERE IS NO CONFLICT BETWEEN THE SIXTH AND SEVENTH CIRCUITS REGARDING THE APPLICATION OF THE ALL WRITS ACT, 28 U.S.C. § 1651, TO PROTECT THE INTEGRITY OF A DISTRICT COURT JUDGMENT.

Petitioners argue for the grant of a writ of certiorari by insisting that the Sixth Circuit's decision below creates a division of opinion among the circuit courts, specifically between the Sixth and Seventh Circuits. In fact, no circuit split on this issue exists. The circuit courts agree that the All Writs Act is a proper instrument by which a district court can

take jurisdiction of an otherwise unremovable state-court action when doing so is necessary to protect the integrity of its orders. *See, e.g., In re VMS Securities Litigation,* 103 F.3d 1317 (7th Cir. 1996); *White v. National Football League,* 41 F.3d 402 (8th Cir. 1994), *cert. denied, 515* U.S. 1137 (1995); *United States v. City of New York*, 972 F.2d 464 (2d Cir. 1992).

Petitioners can assert the existence of a conflict only by mischaracterizing a decision of the Seventh Circuit, which is not inconsistent with the opinion of the Sixth Circuit here. *In re Application of County Collector of Winnebago County, Illinois*, 96 F.3d 890 (7th Cir. 1996). In any event, to the extent that *Winnebago County*, when issued, was inconsistent with the opinion of the Sixth Circuit, it has been reframed in the context of *VMS Securities, supra.*

Here, the Sixth Circuit clearly stated its position on the question whether the All Writs Act could provide sufficient basis for federal jurisdiction to protect the integrity of a district court's orders. It held that the All Writs Act gives district courts the authority to remove an otherwise unremovable state court case for the purpose of effectuating and preventing the frustration of orders that it had previously issued in exercise of jurisdiction otherwise obtained. This ruling is consistent with earlier opinions of the Sixth Circuit. *See, e.g., Striff v. Mason*, 849 F.2d 240 (6th Cir. 1988); *Sable v. General Motors Corp.*, 90 F.3d 171 (6th Cir. 1996). There is no question that the district court had jurisdiction of the Clean Water Act claims in *United States v. Wayne County* pursuant to that authority.

This ruling does not, as Petitioners suggest, conflict with the ruling of the Seventh Circuit in *Winnebago County,*

supra. To be sure, in that case the Seventh Circuit reversed a district court's ruling that the All Writs Act could be the sole basis for obtaining jurisdiction of a case raising only state constitutional issues; but there are crucial procedural and factual differences between *Winnebago County* and this case. These differences eliminate any suggestion of dispute between the Sixth and Seventh Circuits.

In *Winnebago County*, the taxpayers affected by the excess levies filed objections in state court. The defendant school district intervened in these state-court proceedings and removed each of these cases to the district court, where it sought the dismissal of the objections. The district court allowed removal, citing the All Writs Act as authority. Eventually, the district court granted relief in favor of the school district. The tax objectors appealed that ruling to the Seventh Circuit.

A. In This Case The Court Found Violations Of Federal Law And The Necessity To Take Certain Actions To Comply, While In Winnebago County, No Violation Of Federal Law Had Been Established.

In *Winnebago County,* the defendant issued bonds to pay for improvements contained in a Second Interim Order issued by the court, and it funded the bonds by levying taxes in excess of state-law limits. At the time of the consent decree and tax levy, the defendant had not admitted liability for the alleged discrimination, and the district court had made no findings with respect to the allegation. The Seventh Circuit held that jurisdiction to remove the state court case depended heavily on a finding that violations of federal law had occurred and that the order at issue was needed to address the

violations. Lacking such findings by the district court, the Seventh Circuit reversed that court's decision on removal.

In reaching that decision, the Seventh Circuit reasoned as follows.

First, the Seventh Circuit held that the All Writs Act did not provide unlimited jurisdiction on the federal courts. *Winnebago County*, 96 F.3d at 900. Rather, its purpose was to give district courts an adaptable instrument that they could use to protect the integrity of their orders in a variety of situations. *Id.* But Seventh Circuit did hold, using negative phrasing, that the All Writs Act does properly serve as a sole basis for district court jurisdiction to protect the terms of a consent decree when the relief sought in state court implicates the authority of the district court itself. *Id.* at 900-903. That is, where a the relief sought in state court does not implicate the authority of the district court to enforce its consent decree, the All Writs Act does not provide a sufficient basis for the assertion of federal jurisdiction, but the converse is also true.

The *Winnebago County* court then analyzed the various types of consent decrees to answer the question whether a state court action implicates the authority of the district court. Some consent decrees simply validate settlement agreements between the parties reflecting, in effect, a district court's recognition of a private contract. The validity of such consent decrees depends entirely upon the parties' authority to enter into them. *Id.* at 901. But other consent decrees relate to enforcement of federal law which under most federal statutes is the prerogative of the federal courts. For example, a federal Clean Water Act enforcement action with regard to unpermitted discharges to a publicly owned treatment works

"shall be brought in the district court for the United States," 33 U.S.C. § 1319(f), as must citizen suits under the Clean Water Act, 33 U.S.C. § 1365(a). These latter consent decrees are usually entered following a finding of liability or "necessity" by the district court under statutes such as 33 U.S.C. §§ 1319(b) & (f).*Winnebago County* at 901-02.The court defined "necessity" as "a finding by the district court that specific terms of a consent decree are necessary to remedy the violation of a legal wrong." *Id.* at 902, n. 17.

The *Winnebago County* court noted that, in its prior opinion in the underlying discrimination case:

> "We posed the interesting question of whether the finding [of liability] could be made on abbreviated proceedings, before the conclusion of litigation. Where a violation is clear, 'consent' is 'no more than knuckling under to the inevitable [and] is more like an adjudication than a contract.'"

Id. at 901 n.15 (citations omitted) (quoting the underlying case, *People Who Care*, 961 F.2d 1335, 1338 (7th Cir. 1992).

In light of this difference between types of consent decrees, the Seventh Circuit held that the All Writs Act did not provide sufficient authority for the district court to remove the state-court case as a means of protecting the Second Interim Order. *Winnebago County*, 96 F.3d at 900-03. The court went on to note that:

> "*Dunn* and our other precedent discussing the legal effects of consent decrees strongly indicate that, in a case such as this *where a*

> *consent decree was entered without findings of liability or 'necessity,'* the All Writs Act does not permit the removal of a third-party action claiming that a party to the consent decree acted without authority under state law."

Id. at 901-02 (footnotes omitted) (emphasis added) (citing *Dunn v. Carey*, 808 F.2d 555 (7th Cir. 1986)).

The Seventh Circuit distinguished this situation, however, from one in which a district court relies upon the All Writs Act to take jurisdiction of a case that threatens the integrity of a consent decree which is based upon a finding a liability or necessity. Such a case would implicate the district court's jurisdiction, and the Seventh Circuit did not dispute that All Writs Act was designed to address such an implication. *Id.* at 903-04. Indeed, the *Winnebago County* court noted that, while it was considering the removal of the tax objectors' suit, the underlying discrimination claim had proceeded and the district court had made findings of liability for the school district and had developed a remedial scheme. Citing this Court's opinion in *Missouri v. Jenkins*, 495 U.S. 33 (1990), the Seventh Circuit noted that state law could not stand in the way of a remedy designed to ensure compliance with federal law. *Winnebago County*, 96 F.3d at 903-04.

In contrast, the *Wayne County* case presents a situation in which the district court had made findings of liability and necessity in its Final Judgment. See discussion *supra*. There was never any question that the Respondents in this case had violated the Clean Water Act or that the improvements to the wastewater treatment system were necessary to bring that system into compliance with the federal Clean Water Act.

The district court formalized the finding of those violations in its Final Judgment and the holding that the Improvements were necessary to correct these violations. The implementation of the Consent Decreeand the Financing Plan in the *Wayne County* case was pursuant to these findings of violations of the Clean Water Act and of the necessity of the 1993 Project Plan to cure the violations.

B. This Case Involves a State Court Proceeding Intended To Enjoin Compliance With An Express Federal Court Order

Winnebago County arose in connection with a separate case brought in federal district court where the plaintiffs alleged that a school district discriminated against students on the basis of race. The parties to the discrimination case entered into a consent decree, which the district court described as a "Second Interim Order" and which required the adoption of costly remedial measures but which did not specify the mechanism by which the school district would fund the remedies. When the district court invoked the All Writs Act to take jurisdiction of otherwise unremovable state cases, it had not issued any orders that would have been directly countermanded by granting the relief requested in the state cases

The Seventh Circuit pointed out:

> "After carefully reviewing the terms of the Second Interim Order, we conclude that the order did not require the school district to levy the taxes at issue in this case. Although the order directed the school district to fund remedial programs, it explicitly, left the

> manner of funding the remedial relief completely in the discretion of the school district. . . . The district court's observation and conclusion as to the legality of the levies under the Tort Immunity Act simply cannot be read as an order compelling the school district to impose taxes under the Act."

Winnebago County, 96 F.3d at 898-99.

Here, Judge Feikens specifically ordered Respondents to levy the taxes if they had not otherwise complied with his order to pay for the sewer improvements. Final Judgment, ¶8(a) - (c), Resp. App., pp. 8b-12b. When Petitioners challenged the district-court-ordered levy to finance the improvements, they were directly challenging the district court's authority to impose those requirements. To make that challenge, they asked the Michigan circuit court in their state-court complaint to enjoin Respondents' assessors from complying with § 8 of the Final Judgment, which orders the assessor to impose the challenged assessment. This is clear from the pleadings of the Class Action Complaint and Jury Demand, ¶¶ 1, 23 and 24. Resp. App. pp. 77b *et seq.*, discussed above.

In other words, if the district court here had not removed Petitioners' case, Respondents' tax assessors faced the prospect of being ordered by the federal court to assess the tax and by the state court to not assess the tax. There can be no more direct conflict between the orders of state and federal courts.

In this respect the Sixth and Seventh Circuits agree, as do other Circuit Courts of Appeal. *See, e.g., In re VMS*

Securities Litigation 103 F.3d 1317 (7th Cir. 1996); *White v. National Football League*, 41 F.3d 402 (8th Cir. 1994), *cert. denied*, 515 U.S. 1137 (1995); *United States v. City of New York*, 972 F.2d 464 (2d Cir. 1992); *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989).

USEPA v. City of New York provides a valuable parallel to this case. The Second Circuit upheld the removal of a state court action challenging the legality of sludge management contracts that the defendant city entered into pursuant to a consent decree with USEPA to resolve a Federal Ocean Dumping Ban Act enforcement action. The plaintiffs there had alleged that the contracts were illegal under the general municipal law because the city had failed to submit contracts for competitive bidding. The circuit court concluded that the removal of the state court case was necessary to protect the integrity of the federal consent decree.

> "*** A decision by a state court canceling the contracts would jeopardize the ability of the City to comply with the timetables contained in the federal consent decree. The City would be forced, on an emergency basis, to seek alternative means of disposing of the enormous quantities of solid waste generated every day."

City of New York, 972 F.2d at 469.

Here, interference by Petitioners with the district-court-ordered financing plan using the state court as a vehicle would have required the Respondents "on an

emergency basis, to seek alternative means of [raising] enormous quantities of [cash]" to meet the payment obligations on nearly $200 million in bonds which had been sold. That would unquestionably have interfered with Respondents' abilities to construct the Improvements and cure the Clean Water Act violations according to the schedule in the Consent Decree!

In summary, the district court here had subject-matter jurisdiction because of the relief sought in the state court suit and properly denied remand of this case, as the Sixth Circuit recognized.

II. THIS COURT SHOULD DENY THE PETITION BECAUSE THE DISTRICT COURT ALSO HAD AUTHORITY TO REMOVE THE CASE PURSUANT TO ITS RETENTION OF CONTINUING JURISDICTION IN *UNITED STATES v. WAYNE COUNTY.*

Petitioners also argue that the Sixth Circuit erred in ruling that the terms of the Consent Decree in *Wayne County* provided jurisdiction for removal of Petitioners' state court case. In making this argument, Petitioners invoke the principle that a court's decree can only affect the substantive rights of the parties to the decree, not the substantive rights of non-parties. Of course, as discussed extensively above, this argument is decisively rejected by the *Winnebago County* opinion, the case upon which Petitioners place almost exclusive reliance in their arguments regarding the All Writs Act. Respondents certainly do not question that principle as limited by *Winnebago County*, but point out it has no application here. By taking jurisdiction of Petitioners' case, the district court did not affect Petitioners' substantive rights;

it only affected the forum in which those rights were adjudicated. The district court in this case addressed and resolved Petitioners' state law claim on its merits.

On this point, Petitioners principally question the Sixth Circuit's reliance upon *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013 (6th Cir. 1995), to support the proposition that a district court's authority to enforce a consent decree provided the court with continuing jurisdiction to adjudicate state-court suits where the relief requested in the state-court suit would affect the consent decree. Petitioners contend that the Sixth Circuit read *Vanguards* too broadly. They argue that the holding of *Vanguards* must be interpreted in light of this Court's opinion in *Martin v. Wilks*, 490 U.S. 755 (1989), which disapproved *Striff v. Mason*, 849 F.2d 240 (6th Cir. 1988), a case that, *inter alia,* considered a district court's authority to assert continuing jurisdiction over cases affecting its consent decrees.

This argument fails because *Martin* did not reverse the Sixth Circuit's holding in *Striff* regarding continuing jurisdiction. *Striff* reached two legal conclusions: that the district court had jurisdiction to remove the state court action arising out of its power to oversee enforcement its order, and that the action should be dismissed pursuant to the "impermissible collateral attack" rule. *Martin* addressed only the latter conclusion. *Martin,* 490 U.S. at 763 n. 3. That rule had provided that the entry of a consent decree between two parties could preclude third parties from bringing claims that, if granted, would undermine the consent decree. *See Martin, supra.* Thus, the impermissible collateral attack rule effectively allowed two parties to a consent decree to prevent non-parties from having a hearing on their substantive rights.

The rule effectively gave *res judicata* effect to all consent decrees, whether those decrees were the product of freely-made bargains made when the question of liability was unclear or the product of the kind of coercion imposed by the recognition that the court has made or inevitably will make a finding of liability.

In this case, the impermissible collateral attack rule has not be used to bar Petitioners from their day in court. Petitioners have had a hearing on their substantive rights under the Headlee Amendment. The district court held that the Final Judgment in *Wayne County* did not abridge Petitioners' state constitutional rights. It also ruled that Petitioners had waived those rights by delaying their assertion of them. *Bylinski*, 8 F. Supp. 2d at 971-75. Although those state law issues could have been appealed here, Petitioners have abandoned them

Given Petitioners' misapplication of the holdings of *Striff* and *Martin*, they have no basis for their argument that the Sixth Circuit wrongly applied *Vanguards* to this case. *Vanguards* and *Striff* stand for the proposition that, as an incident of their authority to issue consent decrees, district courts may assert continuing jurisdiction to protect the integrity of those decrees including removing state court actions which may interfere with the enforcement of such decrees. This proposition was not affected by *Martin's* rejection of the impermissible collateral attack rule and is good law. The Sixth Circuit did not err in basing its ruling upon it.

CONCLUSION

Petitioners contend that this Court should grant their petition for a writ of certiorari because the district court in this case exceeded its jurisdiction and destroyed their rights under state law. In fact, the district court did not act outside its authority in any way. In the *Wayne County* case, the district court concluded that a massive sewer and treatment plan construction project was essential to obtain compliance with the Clean Water Act and entered an order as to the financing of those improvements. A compliance plan without enforceable financing is a nullity. The *Wayne County* case was brought exactly because voluntary compliance, *i.e.*, funding of improvements which were recognized to be needed in order to come into compliance with the Clean Water Act, had not occurred.

Only after the Improvements neared completion and about $200 million in bonds were sold, did Petitioners asserted rights under the Michigan constitution. They asked the state court to enjoin the heart of the financing plan: the imposition of an assessment in those communities which had failed to pay for their part of the Improvements. The district court ruled that it should assert jurisdiction over those claims so that if relief were appropriate, such relief could be granted in a manner consistent with the court's orders in the *Wayne County* case. It then ruled that those claims had no merit.

These rulings correspond with all of the fundamental principles of federalism and federal jurisdiction, principles upon which the circuit courts are in agreement. Consequently, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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Dated: May 30, 1999

UNITED STATES OF AMERICA and FRANK J. KELLEY, ATTORNEY GENERAL FOR THE STATE OF MICHIGAN, EX REL, MICHIGAN NATURAL RESOURCES COMMISSION, AND DIRECTOR OF THE MICHIGAN DEPARTMENT OF NATURAL RESOURCES, Plaintiffs, -v- WAYNE COUNTY, MICHIGAN; CITY OF ALLEN PARK; CITY OF BELLEVILLE; TOWNSHIP OF BROWNSTOWN; CITY OF DEARBORN HEIGHTS; CITY OF ECORSE; CITY OF LINCOLN PARK; CITY OF RIVER ROUGE; CITY OF RIVERVIEW; CITY OF ROMULUS; CITY OF SOUTHGATE; CITY OF TAYLOR; TOWNSHIP OF VAN BUREN; CITY OF WYANDOTTE; SOUTHGATE-WYANDOTTE RELIEF DRAINAGE DISTRICT; AND ECORSE CREEK POLLUTION ABATEMENT DRAIN, Defendants.
CIVIL ACTION NO. 87-70992
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

DOWNRIVER SEWAGE DISPOSAL SYSTEM 1994 FINANCING PLAN AND FINAL JUDGMENT
RE: 1994 COURT-ORDERED IMPROVEMENTS

WHEREAS, this, Matter having been brought on for hearing on notice of this Court and this Court being fully advised in the premises; and

WHEREAS, the County of Wayne, Michigan ("Wayne"), acting by and through its then Board of Supervisors and pursuant to the authority conferred upon it by Act 185, Public Acts of Michigan, 1957, as amended ("Act 185"), did, by resolution duly adopted by a two-thirds (2/3) vote of the Board of Supervisors, establish a Department of Public Works, now known as the Department of Public Services, Division of Public Works, in and for Wayne for the administration of the powers conferred upon Wayne by Act 185; and

WHEREAS, Wayne is now a Charter County with all powers provided under Act 293, Public Acts of Michigan 1966,

as amended, including the powers conferred by statute and charter on its County Executive (the "CEO"); and

WHEREAS, pursuant to Section 16 of Act 261, Public Acts of Michigan 1966, as amended, all references to county supervisors or county boards of supervisors in any act are deemed to mean county commissioners and county boards of commissioners and, in a Charter County, a county commission; and

WHEREAS, pursuant to Section 2(5) of Act 185 the CEO has all authority, powers, and duties conferred by Act 185 upon a department of public works and is under the general control of the County Commission; and

WHEREAS, Wayne, pursuant to the authority of Act 185 entered into a contract dated March 1, 1962, which contract has been amended from time to time, (the "Downriver Agreement"), with certain communities within Wayne County for the purposes of establishing a Wastewater Control System commonly known as the Downriver Sewage Disposal System (the "System") to address the immediate public health and welfare needs of all or a portion of the residents of those communities, namely the cities of Allen Park, Belleville, Dearborn Heights, Ecorse, Lincoln Park, River Rouge, Riverview, Romulus (then a Township), Southgate, Taylor (then a Township) and Wyandotte and the Townships of Brownstown and Van Buren (referred to collectively as the "Downriver Communities"); and

WHEREAS, in order to operate the System in accordance with law, including sewerage systems of Downriver Communities tributary to the System, it is necessary to obtain a National Pollution Discharge Elimination System Permit (an "NPDES Permit") issued pursuant to the Michigan Water Resources Commission Act, Act 245, Public Acts of Michigan, 1929, as amended, and the Federal Clean Water Act, 33 U.S.C. 1251, et. seq.; and

WHEREAS, additional regulations and requirements have recently been enacted by the USEPA with respect to the disposition and disposal of sludge, a by-product of wastewater treatment, (the "503 Regulations") that will require additional improvements and emission control systems be planned, designed and installed at the System's sewage disposal treatment plant; and

WHEREAS, this Court noticed for entry a certain Consent Decree on February 11, 1994, (the "Consent Decree") in this action, requiring that certain improvements to the System be planned, designed, acquired, constructed and financed all in accordance with a certain schedule attached as Exhibit A and a certain Project Plan dated May 1, 1993, titled "Wayne County Downriver Collection System," which has been summarized in Exhibit B and a "Project Plan for Sanitary Sewer Improvements; City of Riverview" (collectively, the "Project Plan"). The Project Plan has been formulated by the defendants working with the assistance of the Court-Appointed Monitor, the Court-Appointed Expert Witness and Master and in consultation with the USEPA and MDNR; and

WHEREAS, it is immediately necessary and imperative for the public health and welfare of the present and future residents of Wayne and the Downriver Communities that the improvements for the System required by the Consent Decree and the Project Plan (the "Improvements") be planned, designed, acquired, constructed and financed to service the Downriver Communities, as a part of the System; and

WHEREAS, the consulting engineers for Wayne estimate a total cost of approximately Two Hundred Thirty Million Dollars ($230,000,000) to plan, design, acquire, construct and finance all of the Improvements (including the 1994 Improvements and the Local Jurisdiction Improvements, as hereinafter defined) and Wayne and certain of the Downriver Communities intend to file applications with The Michigan Water Pollution Control Revolving Loan Fund Program (the "Revolving Loan Fund") and The Michigan

Municipal Bond Authority (the "Authority") to finance approximately Two Hundred Million Dollars ($200,000,000) of the Improvements; and

WHEREAS, the consulting engineers for Wayne estimate a total cost of approximately Thirty Million Dollars ($30,000,000) to plan, design, acquire, construct and finance certain improvements to the System which are described in the "Bond Amount" column and included in the "Total Construction Costs" now on page 1 of Exhibit C, which includes the cost of certain of the Local Jurisdiction Improvements, all as required by the Consent Decree and the Project Plan (collectively, the "1994 Improvements"), which 1994 Improvements (i) consist almost exclusively of the preparation of engineering plans and (ii) are included within, and not in addition to, the Improvements, of which it is anticipated that approximately Twenty Five Million Dollars ($25,000,000) may become eligible for financing through the Revolving Loan Fund and the Authority; and

WHEREAS, in order to meet the requirements of the Consent Decree, the Downriver Communities and Wayne need to plan, design, acquire and construct the 1994 Improvements and the Downriver Communities desire to have Wayne as their agent to supply the planning, designing, acquisition and construction of the 1994 Improvements required for the System and, if requested, to apply as their agent for loans from the Revolving Loan Fund and the Authority and where necessary receive the funds on behalf of the Downriver Communities; and

WHEREAS, in order to meet the requirements of the Consent Decree, certain of the Downriver Communities need to plan, design, acquire, construct and finance improvements to local sewage systems which are under the jurisdiction and control of each such Downriver Community (respectively, the "Local Jurisdiction Improvements".) and in accordance with this 1994 Financing Plan And Final Judgment Re: 1994 Court-Ordered Improvements (the "1994 Financing Plan And Final Judgment") Wayne may contract with such Downriver

Communities as their agent to supply all or part of the planning, designing, acquisition and construction of such Downriver Communities' respective Local Jurisdiction Improvements and to apply as such Downriver Communities' agent for loans from the Revolving Loan Fund and the Authority; and

WHEREAS, in order to meet the requirements of this 1994 Financing Plan And Final Judgment, the City of Wyandotte ("Wyandotte") has agreed to pay to Wayne Six Hundred Sixty Six Thousand Three Hundred Eighty Three Dollars ($666,383), representing Wyandotte's estimated local share of the cost of the 1994 Improvements ("Wyandotte's Share") to be deposited by Wayne in a Construction Fund Subaccount (as hereinafter defined).

WHEREAS, in order to meet the requirements of the Consent Decree, the City of Riverview has commenced certain local improvements (the "Riverview Improvements") in accordance with the Project Plan for Sanitary Sewer Improvements. City of Riverview, and has issued its bonds to pay part of the costs of the Riverview Improvements and intends to pay further costs of the Riverview Improvements.

NOW, THEREFORE, UPON CONSENT OF THE PARTIES HERETO, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Approval of Project Plan for the 1994 Improvements. As set forth in paragraph 4 of the Consent Decree, the United States of America, acting through its Environmental Protection Agency ("US EPA"), and the Michigan Department of Natural Resources ("MDNR"), acting on behalf of the State of Michigan, have conceptually approved the Project Plan and hereby further approve (i) Wayne's proceeding with the planning, designing, acquisition and construction of the 1994 Improvements and (ii) the Riverview Improvements as contemplated by the Project Plan. The Downriver Communities approve the planning, designing, acquisition and construction of the 1994 Improvements. Wayne approves the

planning, designing, acquisition, construction and financing of the 1994 Improvements.

2. 1994 Improvements Necessary for Public Health. The 1994 Improvements to be designed will service the Downriver Communities and their residents and are hereby ordered to be immediately necessary to protect and preserve the public health.

3. Wayne's Use of Rights-Of-Way. The Downriver Communities hereby consent to the use by Wayne of the public streets, alleys, lands and rights-of-way in the Downriver Communities for the purpose of constructing, operating and maintaining the 1994 Improvements and in order to evidence and effectuate the foregoing consent, the Downriver Communities will execute and deliver to Wayne such grants of easement, right of way, license, permit, consent or other agreement as may be required by Wayne.

4. Approval of the Estimated Cost for the 1994 Improvements. Wayne and the Downriver Communities hereby approve the estimated cost for the 1994 Improvements as prepared by the consulting engineers and as set forth in Exhibit C attached hereto. Such estimated costs for the 1994 Improvements may include, but are not limited to, costs for all surveys, plans, specifications, acquisition of property for rights-of-way, physical construction necessary to acquire and construct the 1994 Improvements the acquisition of all materials, machinery and necessary equipment, contingency allowance, and engineering, engineering supervision, administrative and legal expenses necessary in connection with the planning., designing, acquisition and construction of the 1994 Improvements.

5. Issuance of Bonds. Wayne, acting solely by its County Commission, shall authorize the issuance of the bonds, in a principal amount not to exceed Thirty Million Dollars ($30,000,000), plus (i) any amount required to fund the Reserve Fund described in Section 14 and (ii) the principal amount of

any bonds to be issued by Wayne for any Local Jurisdiction Improvements. The bonds issued hereunder shall be limited tax general obligations of Wayne.

In addition to bonds issued in accordance with the preceding paragraph, if the Judgment Payments (as defined in Section 8(b) hereof) and the proceeds from the sale of the bonds are not sufficient to complete the 1994 Improvements, Wayne may issue additional bonds (including any bonds sold to the Authority) in an aggregate amount sufficient to complete the 1994 Improvements.

6. Wayne to Plan, Design, Acquire and Construct the 1994 Improvements. Wayne will plan, design, acquire and construct the 1994 Improvements on behalf of the Downriver Communities and Wayne and for that purpose will take bids and/or proposals for the planning, designing, acquisition and construction thereof.

7. Downriver Communities to be Beneficial Owners of Local Jurisdiction Improvements and 1994 Improvements. While any bonds remain outstanding which were issued by Wayne for any Local Jurisdiction Improvements, each such Downriver Community shall be a beneficial owner of its Local Jurisdiction Improvements and each such Downriver Community shall operate, maintain and administer its Local Jurisdiction Improvements as a part of its local sewage disposal system and pay all costs thereof, so as to keep all such facilities in proper repair and working order in compliance with all applicable federal state and local regulations, and Wayne shall have the right to inspect the Local Jurisdiction Improvements at reasonable times to insure that each Downriver Community's maintenance and operation is appropriate. Each Downriver Community also shall be a beneficial owner of the 1994 Improvements to the extent of its allocable share of the cost of such 1994 Improvements.

8. Judgment Requiring Payment. Each Downriver Community is hereby ordered to pay its portion of the

local-share costs of the Improvements, in accordance with the allocations as set forth in Exhibit C. Except as otherwise provided herein, each Downriver Community is hereby ordered to pay its local - share costs of the 1994 Improvements, if any, in cash, or as otherwise provided in Section 8(b), on or before the closing date on the sale of the bonds described herein. Each Downriver Community shall pay its portion of the local - share costs of the Improvements (other than the 1994 Improvements) in the amounts and at the time determined by Wayne to be necessary to comply with the Consent Decree. To the extent that a Downriver Community does not pay its local - share costs of the Improvements (other than the 1994 Improvements) at the times required by Wayne, Wayne shall collect such local - share costs in a manner similar to Sections 8(a)-(c) below. Wyandotte is hereby ordered to deposit Wyandotte's Share with Wayne, to be held by Wayne in a subaccount of the construction fund (a "Construction Fund Subaccount") to be maintained by Wayne in connection with the construction of the 1994 Improvements and in accordance with Section 10(g). Wyandotte shall be deemed to have paid the Wyandotte Share in cash for purposes of this Agreement. It is the understanding of the parties that Wayne shall, where appropriate, adjust the allocations to properly reflect community cost apportionments based on data collected during the 1995 flow monitoring and after the subsequent reports have been completed. It is also the understanding of the parties that receipt of these allocations does not prevent any party from raising issues between itself and other parties as to allocations of costs related to construction. Any adjustments to the allocations described in this paragraph shall be computed in accordance with the Cost Allocation Methodology attached as Exhibit D.

(a) Filing of Judgment Against Certain Downriver Communities. With respect to any Downriver Community that does not pay its Judgment Payments (as defined in Section 8(b) hereof) in cash prior to the closing date for the sale of Wayne's bonds, a certified copy of this 1994 Financing Plan And Final Judgment shall be filed with the assessing officer of each Downriver Community that is a city, and with the supervisor of

each Downriver Community that is a township (collectively, the "Assessing Officer"), pursuant to Section 6093 of Act 236, Public Acts of Michigan 1961, as amended ("Act 236"), and this 1994 Financing Plan And Final Judgment. The Judgment Payments shall be assessed by the Assessing Officer of each Downriver Community upon the taxable property of the Downriver Community in the annual amounts required to be paid hereunder; provided. however, that such annual assessment shall not be required (i) to the extent that the Downriver Community has provided to Wayne the resolution required by Section B(c)(i) and paid the applicable Judgment Payments at least forty five(45) days prior to the Levy Date for such year or (ii) if proceeds from the issuance of a Downriver Community's bonds or other evidences of indebtedness are paid to an escrow account with terms satisfactory to Wayne and solely for purposes of paying the Judgment Payments, then to the extent that the amount in such escrow account is verified by independent certified public accountants satisfactory to Wayne to be sufficient to pay succeeding annual assessments of the Judgment Payments. then such annual assessments of the Judgment Payments shall not be required. Judgment Payments received by Wayne under this subparagraph shall be held by Wayne in an interest-bearing account (subject to any restrictions imposed by state or federal law) and applied to the next Judgment Payments due by such Downriver Community, with any excess being retained in such account to be applied to the next Judgment Payments due. The treasurer or collecting officer of each Downriver Community charged with collection and payment of such Judgment Payments is specifically authorized and directed to pay said sums to Wayne, to apply on the obligations of the Downriver Community as herein set forth. In addition to the foregoing, Wayne shall have all other rights and remedies provided by law to enforce the obligations of the Downriver Community to make its Judgment Payments and other payments required hereunder in the manner and at the times required by this 1994 Financing Plan And Final Judgment. The Downriver Community will not take any action to reduce the right of Wayne to receive state-returned moneys of such Downriver Community in the event of default. It is

hereby ordered that the rights of plaintiffs under Section 6093 of Act 236, to require the Assessing Officer to assess such payments on the taxable property of the Downriver Community with respect to the Improvements, are hereby assigned to Wayne and any such payments received by plaintiffs from the Downriver Communities shall be paid to Wayne. Wayne acknowledges receipt of and accepts such assignment.

(b) Judgment Payments. Each Downriver Community is hereby ordered to make the following payments to Wayne (the "Judgment Payments") severally, and not jointly:

(i) in the case of a Downriver Community paying its local share (as determined in accordance with pages 1-5 of Exhibit C) of the cost of the 1994 Improvements in cash, such cash amount, which shall be paid to Wayne on or before the closing date for the sale of Wayne's bonds and deposited in a Construction Fund Subaccount, together with such Downriver Community's local share of all other expenses, costs and fees incurred or charged by Wayne in connection with the 1994 Improvements, at such times as Wayne shall determine, including without limitation expenses of planning, designing, acquiring and constructing the 1994 Improvements, but excluding any expenses of financing the 1994 Improvements; or

(ii) in the case of a Downriver Community not paying its local share of the cost of the 1994 Improvements in cash, an amount equal to its local share of the cost of the 1994 Improvements sufficient to allow Wayne to pay the principal of and interest when due on Wayne's bonds (including any bonds sold to the Authority), and to maintain the Reserve Fund described in Section 14, all at such times as Wayne shall determine, together with such Downriver Community's local share of all other expenses, costs and fees incurred or charged by Wayne in connection with the 1994 Improvements, at such times as Wayne shall determine, including without limitation expenses of planning, designing,

acquiring, constructing and financing (including bond discount and credit enhancement) the 1994 Improvements; and

(iii) in the case of each Downriver Community, in addition to the amounts described in Section 8(b)(i) or Section 8(b)(ii) above, if Wayne determines that the actual cost of the 1994 Improvements exceeds the estimated cost of the 1994 Improvements, an amount equal to such Downriver Community's local share of such increased costs of the 1994 Improvements within thirty (30) days after delivery by Wayne of notice of such increase or, in the event Wayne issues its bonds (including any bonds sold to the Authority) for such increased costs, in annual installments in the manner provided in Section 8(b)(ii) above.

The Downriver Communities are hereby ordered to pay the Judgment Payments to Wayne without regard to whether the 1994 Improvements are actually completed or placed in operation, and such Judgment Payments shall not be reduced by any Downriver Community for any amounts that are attributable to other claims or offsets among the parties. Notwithstanding the preceding sentence, Wayne shall apply the Judgment Payments it receives, in such manner as Wayne shall determine, to the cost of the 1994 Improvements and Wayne's expenses, costs and fees in connection with the 1994 Improvements.

(c) Notification of Required Judgment Payments. Wayne shall, simultaneously upon the sale of the bonds, deliver to each Downriver Community described in Section 8(a) a complete schedule of the estimated Judgment Payments due in calendar years 1994 and 1995. Within twenty-one (21) days after such delivery, each Downriver Community shall provide Wayne with a resolution of its governing body satisfactory to Wayne resolving that:

(i) it has adequate funds available that shall be reserved to pay such Judgment Payments; and/or

(ii) to the extent that it does not have adequate funds available to pay such Judgment Payments the Assessing Officer shall assess taxes on the taxable property of the Downriver Community on the Levy Date sufficient to pay such deficiency and shall direct its treasurer or collecting officer to establish an expenditure account to pay such deficiency and a revenue account to receive taxes assessed for such Judgment Payments; and

(iii) its treasurer or collecting officer shall pay such Judgment Payments to Wayne as such amounts are collected.

The "Levy Date" for the Downriver Communities that are (i) cities shall be July 1 or December 1 of each year, upon Wayne's approval, and (ii) townships shall be December 1 of each year, unless otherwise changed by applicable Michigan law.

On March 1, 1995, and on March 1 of each succeeding year, Wayne shall deliver to each Downriver Community a complete schedule of the estimated Judgment Payments due in the following calendar year. On April 15, 1995, and on April 15 of each succeeding year, each Downriver Community shall provide Wayne with a resolution in accordance with Sections 8(c)(i)-(iii) above.

If any arrangements due by any Downriver Comunity hereunder are not paid when due, the amounts not so paid shall be subject to a penalty, in addition to interest, of one percent (1 %) thereof for each month, or fraction thereof, that the same remains unpaid after the due date. Failure of Wayne to notify the Downriver Communities of any such Judgment Payments shall not relieve the Downriver Communities of the obligation to make such Judgment Payments.

(d) Surplus Proceeds. After completion of the 1994 Improvements and payment of all costs thereof, any surplus remaining from the proceeds of sale of bonds and cash received from any Downriver Community on or before the closing on the sale of Wayne's bonds shall be used by Wayne pro rata on

the basis of the local share allocations set forth on pages 1-5 of Exhibit C for (i) reimbursement to those Downriver Communities that paid cash on or before the closing on the sale of Wayne's bonds, such amount to include such Downriver Community's share of interest earned on such surplus or (ii) credit to those Downriver Communities described in Section 8(a) toward the Judgment Payments next due Wayne by such Downriver Communities.

9. Need for the Improvements. This Court specifically finds, based on its review of applicable law and the Project Plan, that (i) the Improvements are needed to comply with the Federal Water Pollution Control Act and Act 245; and (ii) the installation, construction, alteration, improvement and operation of the Downriver Sewage Disposal System , as described with the Improvents, have been ordered in accordance with the Consent Decree, Act 320, Act 245 and the Federal Clean Water Act.

10. Actions to be Taken by Wayne. To provide for the planning, designing, acquisition and construction of the Improvements, and the financing thereof, Wayne is hereby ordered pursuant to and in compliance with Act 320, and solely by authority of its Board of Commission, to:

(a) Submit to the Board of Commission of Wayne a resolution (the "Bond Resolution") providing for the issuance of bonds in one or more series in the amount necessary to finance the planning, designing, acquisition and construction of the 1994 Improvements, and solely the 1994 Improvements, and to pay costs of issuance of the bonds, in the aggregate principal amount not to exceed Thirty Million Dollars ($30,000,000) (except as otherwise authorized pursuant to this 1994 Financing Plan And Final Judgment). Such bonds shall be payable and have such terms as provided in the Bond Resolution and shall be secured as provided in this 1994 Financing Plan And Final Judgment. After due adoption of the Bond Resolution, Wayne will take all necessary legal procedures and steps necessary to effectuate the authorization,

sale and delivery of said bonds, such legal procedures and steps to include, without limitation, the right of Wayne to (i) file with the Municipal Finance Division of the Michigan Department of Treasury notices of intent to issue the bonds described herein and to pay any related fees and to request an order, if applicable, providing an exception for the bonds from prior approval by the Department of Treasury and to request such other waivers from the Department of Treasury as Wayne deems necessary and (ii) file with the Authority such documents as may be necessary to issue and sell Wayne's bonds to the Authority.

(b) Take bids and/or proposals for and enter into and execute final contracts for the planning, designing, acquisition and construction of the Local Jurisdiction Improvements, and the financing thereof, in accordance with the plans and specifications therefor as approved by this 1994 Financing Plan And Final Judgment.

(c) Upon request of a Downriver Community, Wayne shall permit such Downriver Community to take bids and/or proposals for and enter into and execute final contracts for the planning, designing, acquisition and construction of the Local Jurisdiction Improvements. and the financing thereof, in accordance with the plans and specifications therefor as approved by this 1994 Financing Plan And Final Judgment, subject however, to final review and approval by Wayne.

(d) Require and procure from the contractor or contractors undertaking the actual construction and acquisition of the Improvements necessary and proper bonds to guarantee the performance of the contract or contracts and such labor and material bonds as may be required by law, in such amount and such forms as may be approved by Wayne.

(e) Require and procure from the contractor or contractors undertaking the actual construction of the Improvements insurance protecting both the Downriver Communities and Wayne from liability in connection with such

construction. The cost of such insurance shall be considered to be a part of the cost of the Improvements.

(f) Upon receipt of the proceeds of sale of the bonds, comply with all provisions and requirements provided for in the Consent Decree, the Bond Resolution and this 1994 Financing Plan And Final Judgment relative to the disposition and use of the proceeds of sale of the bonds.

(g) In its discretion, temporarily invest any bond proceeds or other funds held by it as permitted by law, and investment income shall accrue to and follow the fund producing such income. Neither Wayne nor the Downriver Communities shall take any act or fail to take any act which would make the interest on the bonds includible in gross income for federal income tax purposes.

11. Other Means is to Satisfy Final Judgment. Nothing herein contained shall be construed to prevent the Downriver Communities from using any combination of the means and methods provided under law or other such funds lawfully at their disposal for the purpose of providing funds to meet their obligations under this 1994 Financing Plan And Final Judgment.

12. Approval of Bonds: Use of Proceeds. The Municipal Finance Division of the Michigan Department of Treasury ("Treasury") has approved the financing of the Improvements as contemplated by this 1994 Financing Plan And Final Judgment. Wayne, the Downriver Communities and Treasury acknowledge that pursuant to Section 8(a) hereof: (i) the Court has ordered assignments of plaintiffs' rights under Section 6093 of Act 236 to require the Assessing Officers of the Downriver communities to assess the payments on the taxable property of the Downriver Communities to Wayne and (ii) the treasurer or collecting officer of each Downriver Community charged with collection and payment of such Judgment Payments is specifically authorized and directed to pay said sums to Wayne unless the Judgment Payments are

otherwise paid in accordance with Sections 8(a) or 11 hereof. Wayne and the Down river Communities acknowledge that it is the intent of some of the Downriver Communities to treat any such assessments of taxes for the Judgment Payments as being in excess of otherwise applicable charter, statutory and constitutional limitations and have assured this Court that none of them will hereafter object to the proposed treatment of such Judgment Payments as being in excess of charter, statutory and constitutional limitations. Treasury will not object to this structure or challenge it in state or federal court. Wayne, the Downriver Communities and Treasury will cooperate to the extent within their power to cause the Revolving Loan Fund and the Authority to purchase the bonds issued by Wayne and shall take all other actions and provide such other assistance as may be necessary to permit Wayne to finance the Improvements in accordance with this 1994 Financing Plan And Final Judgment.

Wayne for itself and as agent for the Downriver Communities, other than Wyandotte, is hereby authorized to submit Parts I, II and III of the Application for Assistance to the Revolving Loan Fund and the Authority with respect to the 1994 Improvements. Any proceeds received by Wayne from the sale of bonds to the Revolving Loan Fund and the Authority with respect to the 1994 Improvements shall (i) if permissible under the Revolving Loan Fund, be paid to the Downriver Communities to reimburse them for Judgment Payments made by them to Wayne in accordance with Section 8(a)(i) and directly related to the 1994 Improvements or (ii) be deposited into the debt retirement fund established for the bonds previously issued for the 1994 Improvements and used solely to redeem, at the earliest possible opportunity, the outstanding bonds directly related to those 1994 Improvements financed by such subsequent bond issue. Wayne shall, within thirty (30) days after any early redemption of bonds, furnish the Downriver Communities with a complete schedule of the known Judgment Payments due on the next succeeding due date. If any Judgment Payments are not paid when due, the Judgment Payments not so paid shall be subject to a penalty, in

addition to interest, of one percent (1 %) thereof for each month, or fraction thereof, that the same remains unpaid after the due date. Failure of Wayne to notify the Downriver Communities of any such Judgment Payments shall not relieve the Downriver Communities of the obligation to make such Judgment Payments.

Wayne and the Downriver Communities each declare their official intent to issue bonds in the maximum principal amount not to exceed Two Hundred Thirty Million Dollars ($230,000,000) to finance the costs of the Improvements and each declare that they reasonably expect to be reimbursed, without interest, for advances made by them towards the cost of the Improvements. Wayne and the Downriver Communities, at the present time, each have determined that there are no funds from sources other than the bonds anticipated herein that are reasonably expected to be reserved, allocated on a long-term basis or otherwise set aside by them, or by any member of a controlled group (as defined in Treasury Regulation §1.150-1(e)) in which they are a member, if any, pursuant to their budget or financial policies with respect to the expenditures for the Improvements expected to be reimbursed from the proceeds of the bonds. Notwithstanding the above, each Downriver Community shall not be obligated to allow Wayne to finance its share of the cost of such Improvements in the above described manner, but may elect to pay its share of the cost of such Improvements in cash.

13. Revenue Sharing. To the extent permitted by law, in the event a Downriver Community described in Section 8(a) fails for any reason to pay to Wayne at the times specified by Wayne County its Judgment Payments or any other amounts ordered to be paid by the provisions of this 1994 Financing Plan And Final Judgment (a "Default"), Wayne shall immediately give notice of such Default and the amount thereof, in writing, to the Treasurer of the Downriver Community, the Treasurer of Wayne, the Treasurer of the State of Michigan and such other officials charged with the disbursement to the Downriver Community of funds returned

by the State and now or hereafter available for pledge under any applicable state law, as provided in this Section. If such Default is not corrected within ten (10) days after such notification, such official charged with disbursement to the Downriver Community of the aforesaid funds is by these presents specifically authorized by the Downriver Community to withhold from the aforesaid funds the maximum amount permitted by law and not previously pledged by such Downriver Community as is necessary to cure said Default and to pay said sums so withheld to Wayne to apply on the obligations of the Downriver Community as ordered herein. Any such moneys so withheld and paid shall be considered to have been paid to the Downriver Community within the meaning of the Michigan Constitution of 1963, the purpose of this provision being solely to authorize and pledge voluntarily the use of said funds in such amounts as may be permitted by law owing to the Downriver Community to meet any past-due obligations of the Downriver Community due under the provisions of this 1994 Financing Plan And Final Judgment.

14. Reserve Fund. Wayne shall (subject to restrictions imposed by state or federal law) maintain a reserve fund in an amount determined by Wayne (the "Reserve Fund"). Wayne shall make the initial payment to the Reserve Fund out of proceeds from the sale of Wayne's bonds. Future payments to the Reserve Fund shall be made, at such times as Wayne shall determine, by the Downriver Communities that are not paying their Judgment Payments in cash on or before the closing date on the sale of Wayne's bonds, so that each such Downriver Community will have in the Reserve Fund an amount equal to the total Reserve Fund required by the first sentence of this Section multiplied by a fraction, the numerator of which is such Downriver Community's share of the outstanding Judgment Payments and the denominator of which is the total outstanding Judgment Payments. Wayne shall withdraw from the Reserve Fund such amounts as may be necessary to meet the principal and interest payments due on Wayne's bonds if the Judgment Payments received by Wayne are insufficient to make such payments. Upon any such

withdrawal from the Reserve Fund, the Reserve Fund shall be restored by Wayne and Wayne shall be reimbursed severally, and not jointly, by each Downriver Community responsible for such insufficiency to the extent of its share of such insufficiency. Notwithstanding the preceding sentence, the Reserve Fund may be used to pay the principal and interest due on Wayne's bonds in the final year of maturity.

15. Future Changes. It is ordered that the structure for Wayne's bonds in this 1994 Financing Plan And Final Judgment shall govern future financings of the Improvements, except as otherwise ordered by this Court, and so long as any of such bonds shall remain outstanding and unpaid, this structure shall not be subject to any alteration or revision which would in any manner materially adversely affect either the security of the bonds or the prompt payment of principal or interest thereon.

16. Entry of Judgment. Each Downriver Community shall adopt a resolution authorizing the entry of this 1994 Financing Plan And Final Judgment.

17. Successors and Assigns. This 1994 Financing Plan And Final Judgment shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns. Except as expressly modified herein, the terms and conditions of the Downriver Agreement shall remain in full force and effect.

18. Riverview Improvements. The City of Riverview is ordered to construct the Riverview improvements and to issue its bonds for that purpose.

19. Transfer of Downriver Collection and Treatment System. Nothing contained in this 1994 Financing Plan And Final Judgment shall be construed as a prohibition against the transfer of the Downriver Collection and Treatment System from Wayne to the Downriver Communities, or any other entity, including an authority created for that purpose, for the

construction, operation and maintenance of said System. Any such transferee of such System will be a successor of Wayne and will be fully bound as to the terms and conditions of this 1994 Financing Plan And Final Judgment, including any obligations issued hereunder.

20. Final Order. This 1994 Financing Plan And Final Judgment (i) shall be contingent upon entry by the Clerk of the Court of the Consent Decree and (ii) shall be a final order upon which the parties may not appeal and which covers all claims by be plaintiffs against the defendants relating to the subject matter hereof. If there is any conflict between the terms of the Consent Decree and this 1994 Financing Plan And Final Judgment, the terms of the Consent Decree shall control.

21. Continuing Jurisdiction of Court. This Court shall retain jurisdiction with respect to any matter which may arise which may involve the interpretation of the terms of this 1994 Financing Plan and Final Judgment or affect the rights of any party arising out of this 1994 Financing Plan and Final Judgment.

22 Counterparts. This 1994 Financing Plan And Final Judgment may be executed in several counterparts.

23. MDNR is signing this 1994 Financing Plan And Final Judgment solely for purposes of effectuating the provisions of Section 1.

24. Treasury is signing this 1994 Financing Plan And Final Judgment solely for purposes of effectuating the provisions of Sections 12 and 15.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of the day and year first above written.

JOHN FEIKENS/U.S.D.J./E.D. OF MICHIGAN

UNITED STATES OF AMERICA and FRANK J. KELLEY, ATTORNEY GENERAL FOR THE STATE OF MICHIGAN, EX REL, MICHIGAN NATURAL RESOURCES COMMISSION, AND DIRECTOR OF THE MICHIGAN DEPARTMENT OF NATURAL RESOURCES, Plaintiffs, -v- WAYNE COUNTY, MICHIGAN; CITY OF ALLEN PARK; CITY OF BELLEVILLE; TOWNSHIP OF BROWNSTOWN; CITY OF DEARBORN HEIGHTS; CITY OF ECORSE; CITY OF LINCOLN PARK; CITY OF RIVER ROUGE; CITY OF RIVERVIEW; CITY OF ROMULUS; CITY OF SOUTHGATE; CITY OF TAYLOR; TOWNSHIP OF VAN BUREN; CITY OF WYANDOTTE; SOUTHGATE-WYANDOTTE RELIEF DRAINAGE DISTRICT; AND ECORSE CREEK POLLUTION ABATEMENT DRAIN, Defendants.
CIVIL ACTION NO. 87-70992
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

CONSENT DECREE

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WHEREAS, Plaintiffs, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), and Frank J. Kelley, the Attorney General for the State of Michigan, ex rel, Michigan Natural Resources Commission et al., filed the Complaint herein on March 18, 1987, against Defendant Wayne County, Michigan (the "County"), alleging that the County has violated the clean Water Act, 33 U.S.C. § 1251 et seq. (the "Act"), the

Michigan Water Resources Commission Act ("WRCA"), MCL 321.1 et seq., and the terms and conditions of National Pollutant Discharge Elimination System ("NPDES") Permit No. M10021156. WHEREAS, on October 26, 1988, Plaintiffs filed the First Amended Complaint ("Complaint"), which added claims alleging violations of the Act, 33 U.S.C. § 1251 et seq., the WRCA, MCL 321.1 et seq., and the terms and conditions of NPDES Permit No. M10021156, against the City of Allen Park, City of Belleville, Township of Brownstown, City of Dearborn Heights, City of Ecorse, City of Lincoln Park, City of River Rouge, City of Riverview, City of Romulus, City of Southgate, City of Taylor, Township of Van Buren, and City of Wyandotte (hereinafter referred to collectively as the "Downriver Communities"), and against the Southgate-Wyandotte Relief Drain Drainage District and the Ecorse Creek Pollution Abatement Drain Drainage District (hereinafter referred to collectively as the "Drainage Districts").

WHEREAS, Defendant Wayne County is a Charter County Corporation organized and existing under the laws and constitution of the State of Michigan.

WHEREAS, Defendant Wayne County owns and operates a wastewater treatment facility located at 797 Central Ave., in Wyandotte, Michigan known as the Wayne County-Wyandotte Wastewater Treatment plant (the "WWTP" or the "plant") pursuant to a contract entered into by the Defendants dated March 1, 1962, under Act 185, 1957.

WHEREAS, each of the other Defendants is either a municipal corporation in Wayne County, Michigan, which collects and delivers sewage to the plant or is a public corporation in Wayne County which collects and delivers sewage to the plant.

WHEREAS, the United States, the State of Michigan, and all Defendants consent to the entry of this Consent Decree in full and final settlement of this action, without the adjudication of any issue or the taking of any testimony.

NOW, THEREFORE, and upon consent of the parties hereto, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the parties and the subject matter of this action under 28 U.S.C. SS 1331, 1345 and 1355, and Section 309 of the Act, 33 U.S.C. § 1319. The Court has pendent jurisdiction over the State's claims under the WRCA, since the alleged violations of the WRCA arise from a common nucleus of operative facts shared with the Federal claims. The complaint states claims against the Defendants upon which the Court can grant relief under the Act and the WRCA.

II. APPLICABILITY

2. A. This Consent Decree shall apply to and be binding upon the United States, on behalf of EPA, the State of Michigan, on behalf of the Michigan Natural Resources Commission and the Michigan Department of Natural Resources ("MDNR"), and the Defendants and their agencies, officers, directors, agents, servants, employees, successors and assigns, and all persons, firms and corporations in active concert or participation with them.

B. Nothing contained in this Consent Decree shall be construed as a prohibition against transfer of the Downriver Collection and Treatment System from the County of Wayne to the Downriver Communities or to another entity,

including an authority created for that purpose, for the construction, operation and maintenance of said System. Any such transferee of the Downriver System will be a successor of the County of Wayne for the purposes of this Consent Decree and the obligations issued thereunder.

C. Transfer by all Defendants. If the Downriver Communities create an entity to undertake the County's obligations under the Decree, and the County transfers its obligations under this Decree to any such new entity or by any other method, the Downriver connunities (a/k/a "transferrors"), as well as the transferee, must certify to plaintiffs that such entity or other transferee possesses the technical, managerial, and financial resources and expertise needed to comply with the terms of this Decree. Such certifications shall be enforceable by either Plaintiff under this Decree and failure to provide reguired certification or failure in fact by any transferee to comply with this Decree shall remain a violation of the Decree by the transferror(s) except the County of Wayne which would no longer be liable under this Decree and either Plaintiff may pursue the transferror(s) for any relief, penalty, or enforcement allowed under the Decree.

D. The undersigned signatories for each Party certify that, together, they: (1) are fully authorized to bind legally such Party to the terms and conditions of this Consent Decree, and (2) had the benefit of legal counsel in the course of deciding to sign this Decree.

III. DEFINITIONS

3. Unless otherwise defined herein, terms used in this Consent Decree shall have the meanings given them in the Clean Water Act and the Michigan Water Resources Cormnission Act, in the regulations promulgated thereunder,

and in NPDES Permit No. M1002ll56, including any revisions, modifications and successors thereto.

For purposes of this Consent Decree the following definitions shall apply:

A. "Bypass" means the intentional diversion of waste streams from any portion of a sewage collection or treatment system, except as authorized by an applicable NPDES Permit.

B. "Complaint" means the Amended Complaint filed in this action on October 26, 1988.

C. "Combined sewage" means a combination of wastewater from residences, businesses, institutions and industries to which is (by design) intentionally added surface or storm waters.

D. "Defendants" means Wayne. County and the Downriver communities.

E. "Downriver Collection and Treatment System" means the pipes and structures, including channels, conduits, manholes, pumping stations and appurtenances, and treatment facilities, required to collect, transport and treat domestic and industrial wastes of the Downriver Communities that are tributary to the WWTP and including the WWTP as well as the "Local Sewer System."

F. "Downriver Cormnunities" means the following thirteen communities or entities, plus the two following drainage districts, all of which are Defendants in this action: the City of Allen Park, City of Belleville, Township of Brownstown, City of Dearborn Heights, City of Ecorse, City

of Lincoln Park, City of River Rouge, city of Riververview, City of Romulus, City of Southgate, City of Taylor, Township of Van Buren, City of Wyandotte, Southgate-Wyandotte Relief Drainage District, and Ecorse Creek Pollution Abatement Drain.

G. "Dry weather flows" means wastewater flows (domestic, industrial, corrunercial and institutional), including infiltration, except those defined as wet weather flows under this Decree.

H. "Enhanced primary treatment" means primary treatment enhanced through preaeration or mechanical flocculation with chemical addition.

I. "Excessive", when used in reference to infiltration and inflow, means the quantities of infiltration/inflow which can be economically eliminated from a sewer system by rehabilitation, as determined by a cost-effectiveness analysis that compares the costs of correcting the infiltration/inflow conditions with the total costs of transportation and treatment of the infiltration/inflow.

J. "Headworks" means wastewater treatment plant preliminary treatment works, including pumping, screening and grit removal.

K. "Infiltration" means the water entering a sewer system and service connections from the ground, through such means as, but not limited to, defective pipes, pipe joints, connections, and manhole walls.

L. "Inflow" means the water discharged into a sewer system, including service connections, from such sources as, but not limited to, roof leaders, cellars, yard and area drains, foundation drains, cooling water discharges, drains from springs and swampy areas, manhole covers, cross connections from storm sewers and combined sewers, catch basins, storm waters, surface run-off, street wash waters, and drainage.

M. "Infiltration/Inflow" and "I/I" mean the total quantity of water from both infiltration and inflow.

N. "Local Sewer System" means the portion of the Downriver collection and Treatment System including pipes and structures, channels, conduits, manholes, pumping stations and appurtenances, for the collection and transport of domestic and industrial wastewaters that are tributary to the Downriver Collection and Treatment System, but which are owned and operated by entities other than Wayne County.

O. "NPDES Permit" means National Pollutant Discharge Elimination System Permit No. M10021156, issued to Wayne County in its own right and as agent for the Downriver Communities, and any NPDES permit issued to any other party Defendant to this civil action concerning treatment or discharge of wastewater in the Downriver Collection System, and all revisions, modifications and successors to any of the NPDES permits covered by this definition.

P. "operational" means the stage where construction has been completed and facilities have been put into operation and are meeting their design standards and any applicable effluent or other limitations.

Q. "overflow", "Combined Sewer overflow", and "CSO", each means the discharge of combined sewage to a surface water, or the discharge of water from a pipe or conduit used for transporting combined sewage for treatment.

R. "Plaintiffs" means the United States, on behalf of EPA, and the State of Michigan, on behalf of the Michigan Natural Resources Commission and the Michigan Department of Natural Resources ("MDNR")..

S. "Primary treatment" means the quiescent sedimentation of wastewater with skinning, collection, and removal of settled sludge, floating debris and grease.

T. "SSES" means Sewer System Evaluation Survey, a report specifying the elimination of infiltration and inflow that is cost effective, and the sewer rehabilitation and other improvements necessary to eliminate this infiltration and inflow.

U. "Secondary treatment" means biochemical treatment of wastewater after primary treatment using bacteria to consume the organic waste as set forth in 40 CFR Part 133.

V. "Unpermitted", when used in reference to bypass and overflow, means bypass and overflow events that are not expressly allowed under a NPDES permit or under 40 CFR 122.41(m).

W. "Upset" means an exceptional incident in which there is unintentional and temporary non-compliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include non-compliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation. See 40 CFR Section 122.41(n).

X. "Wayne County" means the County of Wayne, a Michigan charter County Corporation acting pursuant to the authority of the Wayne County Charter and applicable State law.

Y. "Wet weather flows" means wastewater flows (domestic, industrial, commercial and institutional), including infiltration and inflow, that occur as a result of a precipitation or snow melt event. For purposes of this Decree, wet weather flow shall include the period of time after the end of the rainfall event during which the system continues to transport or treat rainfall induced flows.

IV. COMPLIANCE PROGRAM

4. Completion of all Planning, Design, Construction, and Performance Activities Specified in Attachment A. The facilities recommended in the multi-volume, project plan dated May 1, 1993, titled "Wayne County Downriver Collection System," in combination with Riverview's separately-submitted plan, entitled "Project Plan for Sanitary Sewer Improvements, City of Riverview" (collectively known as the "Project Plan"), are deemed submitted to Plaintiffs and hereby approved by Plaintiffs, and Defendants shall, as set forth herein, take all measures necessary to assure compliance with the Project Plan and this Consent Decree. Defendants acknowledge that this approval does not constitute approval for State Revolving Fund ("SRF") loan assistance under Act 317, 1988, or approval of plans and specifications under Act 98, 1913, and Defendants acknowledge that this approval, like all others under the Decree, is governed by paragraph no. 51 herein. Defendants shall commence and complete all activities -- including but not limited to planning, design, rehabilitation, contracting, construction, and performance certification -- listed in Attachment A hereto (a/k/a "Wayne County Downriver Collection and Treatment System; Engineering Project Schedule; December 15, 1993,") and, except as specified differently in the text of this Decree, Defendants shall cormnence and complete all the activities listed in Attachment A by the deadlines set in Attachment A. In some instances items listed in Attachment A are described in more detail in the Consent Decree. In those instances, Defendants shall commence and complete all activities by the deadlines established in this Decree. If in any instance a deadline imposed in the text of this Decree conflicts with deadline established by Attachment A, the date set in the text of this Decree shall control. If in any instance Attachment A provides for some activity not only a "start" or "finish" date but also a "late start" or "late finish" date, the earlier date shall be

deemed the deadline imposed by the Decree, unless the text of the Decree provides otherwise.

5. Sewer Rehabilitation and Elimination of I/I

A. Sewer System Evaluation Surveys (SSES) and Flow Monitoring Reports. Pursuant to paragraph no. 11 below, Plaintiffs shall review all SSES's submitted by Defendants, all of which have been submitted.

B. After SSES Approval. Within 180 days after approval of the SSES's, Defendants shall submit to Plaintiffs proposed Rehabilitation Plans and Specifications for Wayne County and the following Downriver Communities: City of Allen Park, City of Belleville, Township of Brownstown, City of Dearborn Heights, City of Ecorse, City of Romulus, City of Southgate, City of Taylor, and Township of Van Buren. The Rehabilitation Plans and Specifications shall be consistent with the recommendations set forth in the approved SSES Reports, and shall eliminate excessive I/I.

C. On or before October 1, 1995, Defendants shall complete the facilities and measures described in the approved Rehabilitation Plans and Specifications, and shall provide to the Plaintiffs, for each Defendant listed in subparagraph B of this paragraph, (1) a written certification by a Professional Engineer that all the facilities and measures contained in the Rehabilitation Plans and Specifications have been completed in accordance with the provisions of the Plans and Specifications and this Consent Decree and, (2) upon request, supporting documentation.

D. On or before April 1, 1995, Defendants shall submit to Plaintiffs a proposed Project Certification Flow Monitoring Program ("FMP"), including a cost estimate

and schedule for implementation of the FMP. The FMP shall be developed to measure remaining flows and provide input to the Downriver Hydraulic Model to verify or refine the proposed size of the Storage-Transport system (paragraph no. 7 below). Upon approval by Plaintiffs, Defendants shall implement the FMP.

E. On or before April 1, 1996, Defendants shall submit to plaintiffs a Report identifying in detail the findings of the completed FMP and making recommendations as to the sizes necessary for the Storage-Transport System to, at a minimum, transport all wastewater up to the design flow of the Downriver Collection and Treatment System for treatment without bypass or overflow to achieve and maintain continuous compliance with NPDES Permits, Clean Water Act and WRCA.

6. Upgrade of Wayne County-Wyandotte Treatment Plant ("WWTP")

A. Wayne County shall, on or before February 1, 1994, submit to Plaintiffs a proposed Wayne County-Wyandotte WWTP Improvement/Expansion Program ("WWTP Improvement/Expansion Program") which shall set forth how Wayne County shall achieve, among other things, the following:

(i) Installation of improvements to the high purity oxygen system so as to meet final NPDES dissolved oxygen (DO) and phosphorus limits by May 1, 1994. To accomplish this requirement, Wayne County shall, at a minimum, renovate the existing pressure swing absorption system by May 1, 1994.

(ii) An evaluation of the new chlorine flash mix eductor system and a determination of the effectiveness of the mixer on disinfection and total residual chlorine (TRC) to be completed and submitted to Plaintiffs in a report by January 31, 1994. (See subparagraph 6.B below.)

(iii) At a minimum, completion of installation of WWTP Dechlorination Facilities for TRC by June 1, 1996, and achievement of a TRC of 0.5 mg/1 by June 1, 1996. Corrunencing June 1, 1996, the period of disinfection specified in the final NPDES permit limits shall be in effect.

(iv) Improvements to the chlorine contact tank to meet final NPDES limits for TRC by October 1, 1999.

(v) Improvements to the WWTP to increase reliability and performance of the facilities. Wayne County shall meet final CBOD & TSS NPDES permit effluent limits on or before October 1, 1997.Wayne County shall complete construction of WWTP improvements to the existing facilities on or before October 1, 1997 to increase the performance reliability of the WWTP. These improvements shall, at a minimum, include

improvements to the headworks, solids handling facilities, and maintenance facility.

(vi) Establish secondary treatment capacity to provide secondary treatment to a minimum of 100 MGD, with the goal of 115 MGD, by October 1, 1999. To achieve this requirement, on or before October 1, 1994, Wayne County shall, at a minimum, conduct a field stress test of the secondary treatment facilities at the WWTP for purposes of determining the existing secondary system capacity. Following these tests, a basis of design shall be prepared recommending any necessary modification to the Project Plan.

(vii) Provide WWTP facilities expansion including Chemically Enhanced Primary Treatment (C.E.P.T.) facilities to achieve final NPDES limits by October 1, 1999, and an overall treatment capacity for flows up to 146.5 MGD by October 1, 1999. To achieve this requirement, on or before October 1, 1999, Wayne County shall, at a minimum, construct the expansion to the WWTP needed to consistently provide chemically enhanced primary treatment of flows up to 146.5 MGD. Further, by October 1, 1999, Defendants shall, at a minimum, construct chemically enhanced

treatment facilities, yard piping, pump station renovation, chemical feed equipment, and an additional primary clarifier.

(viii) Provide for preliminary treatment (screening, grit removal and disinfection) of all flows over 146.5 MGD, and meet all NPDES permit limits and conditions, by October 1, 1999. To achieve this requirement, on or before October 1, 1999, Wayne County shall, at a minimum, construct measures to provide such preliminary treatment and discharge of flows in excess of 146.5 MGD. Further, Wayne County shall, at a minimum, construct a headworks facility, and yard piping in accordance with required approvals, and make changes in plant operation so that only discharges permitted under its NPDES permit occur. Wayne County shall construct an outfall to the Detroit River, as described in Section Four of the Project Plan, unless an alternative solution is proposed by all the Defendants and the Plaintiffs then approve the proposed alternative solution.

In the WWTP Improvement/Expansion Program, Wayne County also shall include a schedule for completion of each measure and each component within each measure, and shall also include detailed cost estimates.

B. Wayne County shall complete the chlorine report referenced in paragraph 6.A (ii) above and submit it to Plaintiffs by January 31, 1994. The report also shall include a comparative analysis of the disinfection provided by the contact in the outfall pipe, and of a sample held in the laboratory for the similar contact period. The sampling procedures for determining compliance with final permit limits for fecal coliform shall be determined by Plaintiffs. In addition, in this report Wayne County shall propose for approval by Plaintiffs an interim total residual chlorine (TRC) limit, which Defendants shall comply with commencing May 1, 1994, and continuing until the Dechlorination Facilities are completed.

C. Within thirty (30) days following the fixed deadline for each required submission or activity as described in the WWTP improvement/Expansion Program, Defendants shall provide to plaintiffs (1) a written certification by a Professional Engineer that all provisions specified in subparagraph nos. 6.A (i), (ii), (iii). (iv), (v), (vi), (vii), and (viii) above herein have been completed and, (2) upon request by Plaintiffs, supporting documentation. Written Certification shall include the dates of completion of each requirement in the WWTP Improvement/Expansion Program.

D. On or before October 1, 2000, Defendants shall complete all construction and improvements set forth in the WWTP Improvement/Expansion Program and provide to Plaintiffs written. certification by a Professional Engineer of this fact.

7. Regional Storage - Transport System

A. Defendants shall design and. build a regional storage-transport system and various local collection system relief sewer facilities in accordance with the approved FMP Report and the provisions specified below. The storage-

transport system and relief facilities shall be of sufficient capacity such that the sewage will be transported for treatment in compliance with the requirements of any applicable NPDES permits, the Act, and the WRCA.

B. On or before October 1, 1996, Defendants shall submit to Plaintiffs a Basis of Design for the final design of the Wayne County Storage-Transport System Improvement and Local Relief Program ("STP"), consistent with the approved FMP Report. The plan for the final design of the STP shall include a cost estimate, a detailed description of each component, and a schedule to complete each measure. The schedule shall provide for commencement of construction on or before October 1, 1998, and completion of construction by no later than October 1, 2001. The STP shall be consistent with the conclusions set forth in the FMP, including any modifications directed by Plaintiffs, and shall identify STP facilities to be constructed including:

(i) Storage tunnel pipe, sewers, diversion structures from the existing collection systems and flushing mechanisms for solids removal;

(ii) On-line detention basins;

(iii) Local collection system relief sewers where necessary; and

(iv) New Pump Station at the terminus of the storage tunnel pipe.

C. Within one year after completion of construction required under subparagraph A above, Defendants shall provide to Plaintiffs written certification, by a professional Engineer, that construction of the STP improvements has been completed and that the collection and

storage-transport systems are completely operational and perform as designed. Written certification shall include the dates of completion of each requirement in the STP and any supporting documentation requested by Plaintiffs.

8. Final Project Certification or CAP. On or before October 1, 2002, Defendants shall provide written certification (reviewed and approved by a Certified Professional Engineer) that all construction and other improvements required by this Consent Decree have been completed, are fully operational and that Defendants can now achieve full compliance with the final effluent limits in the NPDES Permit, and all other provisions of the NPDES permit, the clean Water Act and the Water Resources Commission Act. If defendants cannot certify such full compliance, Defendants shall, on or before October 1, 2002, propose a Corrective Action Program (CAP) which identifies the additional facilities, equipment, and improvements, with associated costs and an expeditious implementation schedule, which Defendants will undertake to achieve full compliance. In the proposed CAP Defendants shall indicate which final effluent limits are not as yet achievable and propose interim limits (if necessary) until the CAP is completed. Upon approval of the CAP by the Plaintiffs, Defendants shall implement the CAP pursuant to the approved schedule.

9. Effluent Discharge Limits

A. Interim. Commencing upon effective date of this Decree and continuing through the deadlines for meeting final limits as specified in paragraph no. 6, Defendants shall comply with the interim effluent limits specified in Attachment B hereto, which is incorporated herein by reference. As to any parameters listed in Attachment B but not specifically addressed in paragraph no. 6, Defendants shall

comply, upon the effective date of this Decree, with the interim effluent limits specified in Attachment B.

B. Final Limits. Commencing on the deadlines specified in paragraph 6 for DO, phosphorus, CBOD, TSS and TRC, and commencing October 1, 2002, for all other parameters (or earlier or later as modified by paragraph 8), Defendants shall maintain compliance with all final effluent limits then in place under any NPDES Permit applicable to the WWTP. In the case of NPDES permit limits that have been appealed under any applicable provision of federal or state law where such law allows such appeal, and where the result of such appeal is imposition of a stay of the effluent limit(s) by a court or administrative agency jurisdictionally competent to issue such stay, the stayed limit(s) shall not be considered final for purposes of this Decree until such stay has been lifted or otherwise dissolved. In such a situation, Defendants shall continue to comply with the applicable interim effluent limit. Pursuant to paragraph 8, the October 1, 2002, date for compliance with all other final effluent limits (i.e., other than DO, phosphorus, CBOD, TSS and TRC) is revised to the date when the Final Project Certification is submitted if such submission occurs prior to October 1, 2002; the October 1, 2002, compliance date shall be extended pursuant to the terms of any approved CAP.

10. Wastewater Treatment Bypasses and Their Elimination

A. No Dry Weather Bypasses. Immediately upon lodging of this Consent Decree, Defendants are prohibited from any and all bypassing of any aspect of the Downriver Collection and Treatment System during dry weather periods.

B. Best Efforts to minimize interruption of WWTP operations and any potential or resulting. bypass, overflow, effluent exceedance or other harm. In conducting the work required by this Decree, Defendants may from time to time find it necessary than October 1, 2002, -- in which case such bypass must be eliminated by that earlier date and failure to do so shall constitute violation of this Decree. For those bypass points allowed under this subparagraph, Defendants must to the "maximum extent practicable" minimize bypasses from these bypass points.

D. Bar on Bypasses After September 30, 2002: Commencing October 1, 2002, and at all times thereafter, Defendants shall not allow any bypass of any untreated wastewater, except for emergency bypasses allowed pursuant to 40 C.F.R. Section 122.41(m), or as further specified in subparagraphs F.(i), F.(ii), or F.(iii), and subject to the conditions and entitlements contained in those subparagraphs or elsewhere in this paragraph 10. The decision to allow an emergency bypass shall be made only by the central authority pursuant to subparagraph G. below.

E. Duty to Remove or Seal Bypass Points. On or before October 1, 2002, Defendants shall remove or seal all unpermitted bypass points in the Downriver Collection and Treatment System, except those bypass points allowed under the requirements, conditions, and entitlements of subparagraph F. below.

F. Bypass Points Allowed and Conditions for Allowance and Use After September 30, 2002, Per Subparagraph l0.D. Subject to the conditions set out herein, Defendants may leave in place emergency bypass points on the Downriver Collection and Treatment System. The conditions and requirements for selection of these bypass points are set out herein:

(i) Bypass Points to Protect Treatment Plant and Downriver Collection and Treatment System. Based on flow data and any other technically pertinent information (either extant or developed by Defendants for purposes of this Decree), Defendants may use as emergency bypass points on the Downriver Collection and Treatment System the discharge points identified as nos. 8.0 and 10.1 in Attachment C to the Decree. These two bypass points may be used for the exclusive purposes of saving human life, protecting public health, or mitigating severe damage to the Downriver Collection and Treatment System, in the event of inflows in excess of the capacities for which the Downriver Collection and Treatment System will be upgraded by the design and construction provided for under paragraph numbers 4 through 7 of this Decree. Any bypass using any of the bypass points specified in this subparagraph F.i constitutes a bypass entitling Plaintiffs to stipulated penalties under the stipulated penalty provisions set out in the Decree, including but not limited, to Paragraph 19.

(ii) Nothing in this Decree shall be construed to require Defendants to seal any of the emergency, sanitary equalization basin bypasses identified in Attachment C to the Decree as location nos. 2.0, 3.5, 4.0, and 9.0 so long as such bypass point has been or is approved in the course of issuing the necessary Act 98 construction permit for the sanitary equalization basin that contains the bypass.

(iii) The emergency relief bypass points identified in Attachment C to the Decree as location nos. 2.1, 3.0, and 3.1 may be maintained and used on the terms set forth in Paragraph 10 of the Decree, including

the following: these bypass points may be used for the exclusive purposes of saving human life, protecting public health, or mitigating severe damage to property. Any bypass using any of the bypass points specified in this subparagraph F.iii constitutes a bypass entitling plaintiffs to stipulated penalties under the stipulated penalty provisions set out in the Decree, including but not limited to Paragraph 19.

(iv) Any emergency bypass point allowed under subparagraph F must be monitored, operated, and otherwise handled in compliance with subparagraph G below.

G. On or before October 1, 2002, Defendants shall complete and implement the following requirements, and submit a report detailing the achievement of these items:

(i) Designate a (single) central authority to make the determination to operate any and all bypasses;

(ii) Implement real time monitoring to display the status of the Downriver Tunnel Sewer System to the central authority; and

(iii) Prepare an evaluation of new and innovative technology which could be implemented in order to eliminate or further reduce the need for maintaining emergency bypasses.

H. Nothing in this Decree shall be construed to require that Defendants seal any Combined Sewer Overflow ("CSO") point including those identified in Attachment C to this Decree as Nos. 1.0, 1.1, 6.0, 7.3, 10.0, 10.2, and 11.0, during any time such point is permitted under a final, effective, and valid NPDES Permit issued to any of the Defendants, nor shall anything in the Decree be construed to alter any independent requirement of law, regulation, order, or permit directed at the control, operation, use, or closure of any CSO.

11. Review of Plans and Reports

A. Plaintiffs shall review as expeditiously as practicable all plans submitted by Defendants and shall approve, or disapprove and recommend modifications and/or make comments, to each. Such plans and reports to be reviewed, include, but are not limited to: SSES's, to ensure that they, *inter alia*, address the results of the I/I Flow Analyses that Defendants previously submitted to the State, including the identification of locations and sources of I/I, and the most cost-effective means to eliminate excessive I/I; Rehabilitation Plans and Specifications; certifications of Completion of Implementation of Rehabilitation Plans; the FMP; FMP Reports; the proposed WWTP Improvement/Expansion Program; the STP Plan; and any Corrective Action Plan. MDNR shall have lead responsibility for providing Defendants with comments from the Plaintiffs on such plans, and unless indicated otherwise by MDNR or in a separate written response from EPA, MDNR's response shall be construed as reflective of the Plaintiffs' response. After receipt of any comments, modifications or notification of reasons for disapproval by plaintiffs, and except as provided in paragraph D below, Defendants shall expeditiously submit to Plaintiffs revised plans or other documents which incorporate the modifications and address the comments received from Plaintiffs.

B. Defendants shall submit these revised plans and other documents by the date set forth in Plaintiffs' comments or notification. If Defendants believe that the specified time frame is insufficient, they may seek from Plaintiffs additional time, based on a showing that such additional time will provide for completion as expeditiously as practicable under the circumstances.

C. When each plan is approved, Defendants shall carry out each and every provision of such plan in accordance with the schedule therein. To the extent authorized in writing by Plaintiffs, Defendants may complete any portions of the plans approved by Plaintiffs prior to approval of the full plan.

D. If Defendants object to any disapproval, comment or recommended modification by Plaintiffs to any plan or other document required pursuant to this Consent Decree, then within thirty (30) days of receipt of a Plaintiff's comment or reconmended modification, Defendants may propose to Plaintiffs an alternative.

If Plaintiffs reject the proposed alternative, then Defendants shall either incorporate Plaintiffs' modification or other change or, within twenty (20) days of such rejection, file with the Court a petition for dispute resolution pursuant to Section X. below to determine the appropriate revision to the plan. In any such dispute, Defendants shall bear the burden of establishing that their proposed alternative should be adopted instead of Plaintiffs' position.

12. Operation and Maintenance

A. The Defendants shall maintain and operate the WWTP and the Downriver Collection and Storage System to

minimize equipment breakdowns, interruptions of treatment, and bypasses and overflows.

B. The parties recognize that interruptions in the operation of the plant may be necessary during the period when improvements to the plant are being made. Wayne County shall make best efforts to schedule any necessary interruptions to minimize the possibility and extent of any bypass, overflow, exceedances of effluent limitations, and adverse environmental impacts.

C. Not later than ninety (90) days after the award of contracts for construction on the WWTP Improvements under paragraph no. 6 above, the County shall submit to Plaintiffs for their approval a Plan for Construction. That Plan shall identify the interruptions in treatment anticipated throughout the construction activities, and measures to minimize the number and duration of any interruptions and any adverse impact of any interruption. Defendants shall modify the Plan to address any comments received from Plaintiffs.

D. During construction, the County shall give at least five (5) days notice to the MDNR of all planned interruptions of plant operations, by telephone call to the MDNR Southeast Michigan District Office at (313) 953-1451, or, in the alternative, at (313) 953-0241, or, in the event neither of the preceding numbers effects the necessary communication, at any alternate number specified for that purpose by the MDNR from time to time. A written report confirming the interruption shall be delivered to EPA and MDNR within ten (10) days of any bypass or interruption.

E. Nothing in this Section, including notification under this Section, will excuse any failure by Defendants to comply with any requirement of this Decree.

F. Defendants shall submit to Plaintiffs for their approval proposed Operation and Maintenance ("O & M") Manuals in accordance with the following schedule:

(i) October 1, 1999: O & M Manual for the Wayne County-Wyandotte WWTP; and

(ii) July 1, 1998: O & M Manuals for the Local Sewer System and all other portions of the Downriver Collection and Treatment System.

G. Each of the O & M Manuals shall include, but not be limited to, the following: mandatory training, routine inspections, replacement of parts, and operation procedures.

H. Upon approval or modification by Plaintiffs, Defendants shall implement the O & M manuals in accordance with the schedules and other provisions therein.

I. Within thirty (30) days after approval of an O & M Manual, Defendants shall submit to Plaintiffs for their approval O & M Work Plans. In addition, on or before October 1 of each year, Defendants shall submit to Plaintiffs for approval updated Work Plans containing the plan for implementation of the O & M program during the following calendar year.

J. The Work Plans shall include, *inter alia*, the following:

(i) a schedule for the systematic and regular inspection of the Downriver Sewage Collection and Transport System, to ensure that the integrity of the system is

maintained and that it is operated in optimal conditions;

(ii) a schedule and method for rehabilitation to remove all excessive infiltration/inflow sources found during the inspections;

(iii) identification of the mechanism that will be used to ensure that sufficient funds are available at all times to correct excessive I/I sources and/or structural defects within the sewage collection and transport system;

(iv) development of a projected annual O & M budget for the next five years including projected funding sources; and

(v) development of an operational plan which includes a system inventory, administrative controls, system maintenance, and operational control strategy.

K. Upon approval by Plaintiffs, Defendants shall implement the O & M Work Plans in accordance with the schedules and other provisions therein.

L. On or before October 1, 1996, Defendants shall develop and submit to Plaintiffs a proposed System Monitoring Program (SMP). The purposes of the SMP include but are not limited to:

(i) Providing means to measure individual community flow contributions and to monitor community flows with respect to allocated capacities in the facilities;

(ii) Providing means to measure flow and provide input to the Downriver Hydraulic Model on an annual basis to verify and ensure the effectiveness of the sewer rehabilitation program;

(iii) Providing means to alert the WWTP operators of levels which indicate a potential for system overflows/bypasses;

(iv) Providing means to correlate climatological data and the systems' responses to wet weather events, including events involving an overflow or bypass.; and

(v) Providing means to track individual community and County flow contributions for issuance of Act 98 sewer construction permits.

M. Defendants shall submit to Plaintiffs a summary report of the SMP data annually or at such other intervals as the parties determine necessary. Upon completion of the construction required under paragraph nos. 5 - 7, Defendants shall submit to Plaintiffs a summary report of the SMP data at least once per month. If any bypass occurs, an Event Report shall be prepared summarizing the reasons for the occurrence and supporting climatological and other documentation. Submittal of a report shall not excuse any bypass or overflow in violation of any NPDES permit, this Consent Decree, the Clean Water Act or the Water Resources Commission Act.

V. STIPULATED PENALTIES

13. Accrual, Demand, and Timing of Payment. Within 45 days receiving a written demand from either Plaintiff, Wayne County shall pay stipulated penalties imposed under this Decree and addressed by the written demand. Stipulated penalties under this decree begin to accrue on the first day of violation, and accrue regardless of whether or when Plaintiffs demand payment, but become due only upon written demand by either Plaintiff as specified above. Any written demand by either Plaintiff for stipulated penalties shall be sent to each person or office listed in attachment D to this Decree.

14. Interim Effluent Limits. Commencing on the lodging of this Consent Decree for all parameters except fecal coliform and TRC, and commencing July 1, 1996 for fecal coliform and TRC, if defendants fail to comply with any effluent limitation set forth by this Consent Decree in Attachment B hereto, Wayne County shall pay stipulated penalties as set forth in the table below for violation of each parameter.

Violation for each parameter	5 to 25% over interim limit	26 to 99% over interim limit	%100 or more over interim limit
Daily Effluent	$400 per day	$1,500 per day	$2,000 per day
7-day average	$1,000 per week	$4,000 per week	$5,000 per week
30 day average	$2,000 per month	$7,500 per month	$10,000 per month

15. Final Effluent Limits. If Defendants fail to comply with any final effluent limitations by the dates set

forth in Paragraph 9), Wayne County shall pay stipulated penalties as follows for violation of each parameter:

Violation of Each Parameter	Penalty
Daily Effluent Limitation	$2000 per day
7-Day Average Limit	$5000 per week
30-Day Average Limit	$10,000 per month

16. Deadlines Related to Paragraph 7 Regional Storage Transport Obligations that are Subject to Stipulated Penalties. If defendants fail to meet the deadlines set forth below that relate to the obligations of paragraph 7 of this Decree, Wayne County shall pay stipulated penalties as follows:

A. For failure to initiate "Segment 1, Community Sewer Rehabilitation, Certification Flow Monitoring Program," pursuant to paragraph 5 requirements on or before September 1, 1995, stipulated penalties shall apply as follows for each day such initiation was delayed or untimely:

Period of Failure to Comply	Penalty Per Day of Noncompliance
1st to 15th day	$ 1500 per day per violation
16th to 30th day	$ 2500 per day per violation
after 30 days	$ 4000 per day per violation

B. For each day after October 1, 1998, on which the physical, on-site construction required under paragraph 7 has not commenced, stipulated penalties shall apply as follows:

Period of Failure to Comply	Penalty Per Day of Noncompliance
1st to 15th day	$ 1500 per day per violation
5th to 30th day	$ 2500 per day per violation
After 30 days	$ 4000 per day per violation

C. For each day after October 1, 2001, on which all construction called for under paragraph 7 has not been in all respects completed, stipulated penalties as follows:

Period of Failure to Comply	Penalty Per Day of Noncompliance
1st to 15th day	$ 1500 per day per violation
16th to 30th day	$ 2500 per day per violation
After 30 days	$ 4000 per day per violation

17. Deadlines Related to WWTP Obligation (Paragraph 6 of this Decree) that are Subject to Stipulated Penalties. If Defendants fail to meet the deadlines set forth below, Wayne County shall pay stipulated penalties as follows:

A. If defendants fail to submit to plaintiffs completed, substantively adequate documents called for under Paragraph 6.A, 6.B, or 6.C, stipulated penalties shall apply as follows for each day such document was submitted untimely or remains in an substantively inadequate state:

Period of Failure to Comply	Penalty Per Day of Noncompliance
1st to 15th day	$ 1500 per day per violation
16th to 30th day	$ 2500 per day per violation
After 30 days	$ 4000 per day per violation

. For each day after October 1, 1997, on which the physical, on-site construction required by the approved WWTP Improvement/Expansion Program has not commenced, stipulated penalties as follows:

Period of Failure to Comply	Penalty Per Day of Noncompliance
1st to 15th day	$ 1500 per day per violation
16th to 30th day	$ 2500 per day per violation
After 30 days	$ 4000 per day per violation

C. For each day after October 1, 2000, on which all construction set out in the approved WWTP Improvement/Expansion Program has not been completed in all aspects, stipulated penalties shall apply as follows:

Period of Failure to Comply	Penalty Per Day of Noncompliance
1st to 15th day	$ 1500 per day per violation
16th to 30th day	$ 2500 per day per violation
After 30 days	$ 4000 per day per violation

18. Incomplete, Inadequate, and/or Untimely Submittal of Reports Under Paragraph No. 30. If any report or other submittal required under paragraph 30 is improper, either because the report or other submittal is untimely or because such submittal fails to meet the substantive requirements of that paragraph, Wayne County shall pay stipulated penalties for each day such submittal was untimely or substantively incomplete or inadequate, or remained

incomplete or inadequate, pursuant to the stipulated penalty schedule set out below:

Period of Failure to Comply with Substance or schedule for Submission	Penalty Per Day of Noncompliance Either in
1st to 15th day	$ 250 per day per violation
16th to 30th day	$ 500 per day per violation
After 30 days	$ 1000 per day per violation

19. Bypasses. If there are any bypasses in violation of subparagraph 10.A, 10.D, 10.E, 10.F, as well as any bypasses under subparagraph 10.F entitling Plaintiffs to stipulated penalties, Wayne County shall pay stipulated penalties as follows:

Number of Days of Any Bypass	Penalty Per Day of Noncompliance
1st to 20th day	$ 2000 per day per violation
21st to 35th day	$ 4000 per day per violation
After 35th day	$ 5000 per day per violation

For counting the number of days of bypass for stipulated penalty purposes, each location where a bypass occurs shall be considered as a separate and distinct bypass. For counting "days" of bypasses, twenty-four hour periods (where the twenty-four hour period is triggered by time at which a bypass commences at any location) shall be used rather than calendar

days. For purposes of calculating stipulated penalties, the number of days of all bypasses

shall accumulate under one running tally for the life of the Decree.

20. If Defendants fail to complete the certification requirement set forth in paragraph a or to submit a completed, substantively adequate Corrective Action Plan by October 1, 2002, Wayne County shall pay a stipulated penalty of $1,500 per day until such time that the obligation is fully satisfied.

21. Within thirty (30) days after any violation or potential violation for which stipulated penalties accrue or may accrue under this Decree (regardless of whether Defendants believe that no stipulated penalty is due), Defendants shall provide Plaintiffs written notification of the violation or potential violation, and the stipulated penalties accrued or potentially accrued (including a citation to the Decree paragraph violated or potentially violated). Written notification under this paragraph shall be independent of and in addition to any other reporting requirement under this Decree.

22. All stipulated penalties due and payable under this Consent Decree shall be paid by cashier's or certified check, or by electronic fund transfer in accordance with the procedures set out paragraph 29 below. Of the payment, fifty percent shall be paid to the State of Michigan, and fifty percent to the United States.

23. Payments to the State shall be in the manner set forth in paragraph no. 27, but provided that no installment or time payment options apply to payment of stipulated penalties and any untimely payment of stipulated penalties shall accrue interest under 28 U.S.C. section 1961 for period from the date the penalties were due until the time of actual payment.

24. Payments to the United States shall be payable in the manner set forth in paragraph 27 below, but provided that no installment or time payment options apply to payment of stipulated penalties and any untimely payment of stipulated penalties shall accrue interest under 28 U.S.C. Section 1961 for period from the date the penalties were due until the time of actual payment.

25. The stipulated penalties provided for in this Decree shall be in addition to any other remedies or sanctions available to Plaintiffs by reason of Defendants' failure to comply with the requirements of this Decree, any applicable NPDES Permit, the Clean Water Act, the WRCA, or the regulations promulgated under the Act or the WRCA. The United States and the State each reserve, without limitation, their rights to seek monetary and injunctive relief pursuant to the Act, the WRCA, or the contempt powers of the Court. However, in any instance where the United States has demanded and timely received payment of stipulated penalties so demanded, the United States will not then seek additional civil penalty for that same violation under the civil penalty provision of the federal Clean Water Act. Similarly, in any instance where the State of Michigan has demanded and timely received payment of stipulated penalties so demanded, the State will not then seek additional civil penalty for that same violation under the civil penalty provision of the WRCA or the federal Clean Water Act. Prior to either Plaintiff's issuing a written demand for stipulated penalties, that Plaintiff considering issuing such a demand shall first consult with its Co-Plaintiff to decide whether such stipulated penalty demand should be issued. Neither Plaintiff shall issue such a demand unless Plaintiffs decide that it shall be issued on behalf of both.

VI. CIVIL PENALTY

26. Wayne County shall pay a civil penalty of $413,000.00, in resolution of the Plaintiffs' civil judicial. claims for penalties as alleged in the Complaint. The civil penalty shall be paid in one of the two options set forth in the following Subparagraphs 28.A and 28.B, and Defendants are deemed to elect between them by their actions.

27. Split of Payment Between Plaintiffs. Payment of fifty percent of the civil penalty (either of each installment or of a one-time payoff) shall be to the United States, by cashier's or certified check (except as otherwise specified in Section VI of this Decree) made payable to the "Treasurer of the United States of America," and tendered to the Office of the United States Attorney for the Eastern District of Michigan, 231 West Lafayette St., Detroit, Michigan 48226. The check shall bear a notation to the civil docket number of this action. Concurrently with sending the check, a copy of the check shall be sent to the EPA Region V Water Division, and to the United States Department of Justice, at the addresses specified in Section VIII of this Consent Decree. Payment of fifty percent of the civil penalty (either of each installment or of one-time payoff) shall be to the State of Michigan, by cashier's or certified check made payable to the "State of Michigan," and tendered to the Assistant-in-Charge, Environmental Protection Division, Office of the Attorney General, P.O. Box 30212, Lansing, Michigan 48909. The check shall bear a notation to the civil docket number of this action. Concurrently with sending the check, a copy of the check shall be sent to the Michigan Department of Natural Resources, Surface Water Quality Division, compliance and Enforcement Section, at the address specified in section VIII.

28. Options for Payment. Defendants must pay the civil penalty by either one or the other of the options specified in this paragraph.

A. Payment Option One. Defendants may pay the civil penalty ($413,000) to Plaintiffs in lump sum (fifty percent of the lump sum to each Plaintiff) within sixty days of the entry of the Decree, and if Defendants make such payment within that time period, where "making payment" means receipt of the checks by Plaintiffs and / or confirmation of electronic fund transfer, then Defendants are not obligated to pay any interest on the civil penalty. If Defendants do not make payment within the time described in this Subparagraph 28.A, then they shall be deemed to have selected Payment Option Two, below, including all terms and conditions of Payment Option Two, including but not limited to payment of interest.

B. Payment Option Two. Consistent with the installment schedule and acceleration provision set out in this Subparagraph 28.B, Defendants shall have through December 31, 1995 to pay the total civil penalty, with interest running on any and all unpaid balances that exist after January 1, 1994, and interest shall accrue at the rate set out in 28 U.S.C. Section 1961. Defendants may pay any or all penalty amounts in advance of the schedule set out herein without suffering any additional penalty as a result of such early payment. The schedule for installment payments is as follows: one-half of the civil penalty, with any and all accrued interest, shall be paid on or before December 31, 1994; and one-half of the civil penalty, with any and all accrued interest, shall be paid on or before December 31, 1995. If any installment payment is not received by Plaintiffs within 21 calendar days after its due date (as set by the installment payment dates established in this subparagraph), all remaining civil penalty installments (including any and all interest)

shall be immediately due, owing, and paid to plaintiffs.

29. If Defendants elect to pay by electronic fund transfer any portion of the civil penalty owed to the United States or the State of Michigan, Defendants may do so. Upon request, the United States and the State will supply Wayne County with any coding or address information needed by Defendants to effect an electronic fund transfer.

VII. REPORTING REQUIREMENTS

30. Reporting on Compliance Activities:

A. Beginning with the first full calendar quarter after entry of this Consent Decree, and for every calendar quarter thereafter until termination of this Consent Decree in accordance with Section XXIV. below, Defendants shall submit to Plaintiffs a written progress report. Each quarterly report shall be submitted no later than the last day of the month following the close of the quarterly reporting period. Each report shall contain the following information for that quarter:

i. the status and progress of the preparation of plans and construction of improvements required under Section IV above;

ii. a projection of the work to be performed under Section IV during the next two calendar quarter; and

iii. identification of any items that might affect timely completion of requirements under Section IV above.

Notification pursuant to this paragraph shall not excuse any failure to timely perform any requirement of this Decree.

B. Within ten (10) days following the deadline for any requirement under Section IV of this Consent Decree, Defendants shall submit to Plaintiffs written notice that the action has been taken or completed, as required. If the action has not been taken or completed as required, Defendants shall submit written notice to Plaintiffs stating the reasons for any failure to timely complete a requirements and the probability of meeting the next deadline in the schedule. The notice shall also describe the actions to be taken or that are being taken to return the program to schedule. Notification pursuant to this paragraph shall not excuse any failure to timely perform any requirement of this Consent Decree.

31. Reporting on Discharges

A. Defendants shall submit to Plaintiffs, postmarked on or before the tenth day of each month, a Daily Discharge Monitoring Report ("Daily Report") for the plant containing analytical test results obtained during the previous monthly monitoring period, and Discharge Monitoring Reports ("DMR") for that period, as required in the NPDES Permit. The Reports shall be in the format required by MDNR, and shall contain data on the analysis of samples taken at the frequency and location specified in the NPDES Permit.

B. In accordance with 40 C.F.R. Section 122.41(m), Defendants shall immediately notify the State and EPA-Region V1 in writing, whenever a bypass of the WWTP collection system, the storage-transport system, or the WWTP occurs, including the requirement to submit, within five (5) days after any such incident, a written report describing the duration, volume and exact location of the incident, an

explanation of conditions which resulted in the bypass, steps taken to stop it, measures taken to eliminate further occurrence, and the results of any sampling and monitoring requirements undertaken in response to the incident.

C. Requirements concerning bypass incident reporting set forth in the preceding paragraph do not affect and shall not serve as a justification for not complying with requirements concerning bypass incidents as set forth in the NPDES Permit.

D. Nothing in this Consent Decree affects the reporting requirements set forth in the NPDES Permit. Defendants' compliance with reporting requirements set forth in this Consent Decree shall not serve as a justification for not complying with any reporting requirement set forth in the NPDES Permit.

VIII. SUBMITTALS

32. Reports, plans, notices, approvals, modifications and comments required pursuant to this Consent Decree shall be submitted to the following persons at the addresses below:

For Plaintiff the United States:

U.S. Environmental Protection Agency,
Region V
Water Division
Compliance Section 5WCC-155
77 West Jackson Blvd.
Chicago, Illinois 60604,

U.S. Department of Justice

Environment and Natural Resources
Division
Environmental Enforcement Section
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044
DJ # 90—5—1—1—2766;

For Plaintiff State of Michigan:

Michigan Department of Natural
Resources
District Supervisor, Surface Water
Quality Division
Southeast Michigan District Headquarters 39000 Seven Mile Road
Livonia, Michigan 48152,

with a copy of the cover letter to

Assistant in charge
Natural Resources Division
Office of the Attorney General
Stevens T. Mason Building, 8th Floor
P.O. Box 30028
Lansing, Michigan 48909,

and submittals under paragraph nos. 23, 27, 30, & 31 to

Michigan Department of Natural Resources
Surface Water Quality Division
Compliance and Enforcement Section
P.O. Box 30273
Lansing, Michigan 48909, and

Assistant-in-Charge

at address above;

For the Defendants:

County of Wayne
Department of Corporation Counsel
415 Clifford
Detroit, MI 48226;

William J. DiBiasi, Esq.
Attorney for Brownstown Township
24825 Eureka Road
Taylor, MI 48180-5159;

Daniel J. Misteravich, Esq.
Attorney for Lincoln Park
2933 Fort Street
Lincoln Park, MI 48146;

Charles Brian James, Esq.
Attorney for Southgate
8623 N. Wayne Road, Suite 200
Westland, MI 48185-1137;

Allen J. Kovinsky, Esq.
Attorney for City of Taylor
2000 Town Center (Suite 900)
Southfield, MI 48076—1100;

Randall A. Pentiuk
Attorney for City of Riverview
230 Superior Place (Suite 320)
20300 Superior Road

Taylor, MI 48180; and

Randy L. Kalmbach
Attorney for Wyandotte
2241 Oak Street
Wyandotte, MI 48192-5317.

To substitute a recipient or change address information set out in this paragraph, a party must serve on all parties and file with the Court the name and address of the person or office to be removed from this paragraph, as well as the name and address of the person or office that is to be added to this paragraph. Such changes shall be effective thirty days after service to all parties and filing of proof of service with the Clerk of the Court.

33. Unless otherwise specified in this Consent Decree, reports, approvals, modifications, comments and notices shall be given in writing, and shall be considered delivered on the day postmarked by the U.S. Mail, with proper postage affixed. If another means is used to deliver a report or notice, it shall be considered delivered upon the date received at the MDNR or EPA office or at the above addresses for defendants.

34. All requirements in plans, reports and other submittals that have been approved by Plaintiffs, including schedules therein, shall be enforceable requirements of this Consent Decree, except to the extent the performance of such requirement is delayed by a finding of force majeure under Section IX of the Decree or altered by agreement of the parties or judicially under Section X (Dispute Resolution) of the Decree, in which case the revised provisions will become enforceable requirements of the Decree.

35. Appointment of Technical Coordinators. Within 21 days after the entry of this Consent Decree, each of the following shall appoint a Technical Coordinator: Wayne County, MDNR, U.S. EPA, and one coordinator for all other defendants. All parties shall advise all Technical Coordinators of any matter any party believes to involve a technical resolution or problem, and all Technical Coordinators designated under this paragraph shall be invited to participate in any technical discussion commenced by any party to this Decree. The sole purpose of this paragraph is to encourage early, coordinated participation of all parties on all technical matters. Nothing in this paragraph is intended to or shall be interpreted as delegations of settlement or approval authority by any party or as a deviation of the rights or obligations otherwise established for the parties by applicable law or this Consent Decree. As counsel for any party deems appropriate, such counsel may attend any meeting involving the Technical Coordinators. If any party changes its Technical Coordinator, it shall promptly notify all of the other parties.

IX. FORCE MAJEURE

36. A "force majeure" event for purposes of this Consent Decree is any event that is caused by circumstances beyond the reasonable control of the Defendants that delays or prevents the Defendants from complying with the terms of this Decree in a timely fashion including completing any studies, programs plans, designs or failure to timely construct the facilities as scheduled. Such events could include by way of illustration and not limitation delays due to fires, strikes, labor disputes, unforeseeable delays in transportation, unusually adverse weather conditions or unanticipated changed site conditions encountered in the course of construction also delays caused by the failure of the Plaintiffs to respond promptly and comment on submittals made by the

Defendants as required by the terms of this Consent Decree. To the extent any such noncompliance with the terms of this Consent Decree is due to a force majeure event, the Defendants shall not be liable for any stipulated penalties set forth in this Decree and the time for performance or compliance with. the terms of this Decree shall be extended by the Plaintiffs to the extent appropriate. An extension of one (1) compliance date due to a particular force majeure event will not necessarily result in an extension of a subsequent compliance date or other unrelated compliance date or dates.

37. Nothing in this section is intended to relieve Defendants of their duty to use all due diligence to complete the requirements of this Consent Decree in a timely matter. Further, unanticipated or increased costs or expenses associated with compliance of this Consent Decree including change in financial circumstances on behalf of the Defendants shall not constitute a force majeure event; provided further, however, that nothing in this paragraph is otherwise intended to preclude Defendants from applying to the Court for a specific enlargement of time under the provisions of Sections IX, X and/or XXII of this Decree — to the extent the allegations and proofs supporting Defendants' application to the Court for the specific enlargement of time are relevant to the provisions of Section IX, X, and/or XXII -- so long as: (a) Defendants first requested the United States and the State for the specific enlargement of time (and provided therewith the allegations and proofs supporting the request) and (b) Plaintiffs had rejected Defendants' request.

38. It shall be the duty of the Defendants to promptly notify the Plaintiffs of any occurrence or circumstance which could result in noncompliance with the terms of this Consent Decree as a result of a force majeure event which under the circumstances is beyond the Defendants' reasonable control and which could not be overcome by due diligence. Such notification shall be in writing to the Plaintiff s and shall describe the terms of this Decree that may be affected by the occurrence, the nature of the noncompliance that could result from the occurrence, the reasons for such occurrence and possible noncompliance that may, in the opinion of the Defendants, cause a violation of the terms of this Decree or result in any upset condition involving the terms of any applicable NPDES permit.

39. If the Defendants and the Plaintiffs cannot agree that the occurrence at issue is a force majeure event or cannot agree on the terms of an appropriate extension of time or other solution, the dispute shall be subject to the dispute resolution procedures of section **X,** infra.

40. Further, without respect to whether or not a given set of circumstance entitles the Defendants to certain protection and relief related to the force majeure event, the Defendant shall comply with the terms of this Consent Decree that are unaffected by the force majeure event, and the Plaintiffs. shall retain the right to enforce the terms and. obligations of this Decree that are unaffected by the force majeure occurrence.

X. DISPUTE RESOLUTION

41. If in the opinion of any party there is a dispute between Plaintiffs and Defendants with respect to the interpretation of or compliance with this Consent Decree, such dispute shall in the first instance be the subject of informal negotiation between the Defendants and the Plaintiffs. That party shall send a written notice to the other parties which outlines the nature of the dispute and requests informal negotiation to resolve the dispute. Such period of informal negotiations shall not extend beyond thirty (30) days from the date when the notice was sent, unless the parties agree otherwise. In an emergency, either party may seek relief directly from the Court prior to expiration of the informal negotiation period, with the party moving for such relief bearing the burden of proving that an emergency exists and that the position advocated by that party should be adopted under the terms of this Decree.

42. If the informal negotiations are not successful, Defendants shall comply with Plaintiffs' position unless Defendants file with the Court a petition for resolution of the dispute within twenty (20) days of receipt of a document setting forth the Plaintiffs' final position. Defendants' petition shall describe the nature of the dispute and provide a proposal for its resolution. The Plaintiffs shall have twenty (20) days to file a response with an alternate proposal for resolution. In any dispute, the party seeking relief from the Court bears the burden of proof.

43. In all disputes, the party seeking relief from the Court must demonstrate that the relief it seeks fulfills the terms and requirements of this Consent Decree. If the dispute at issue involves a force majeure event under Section IX, supra, then the burden of going forward and the burden of proof shall be on the Defendants. In all issues, the burden of proof shall be a preponderance of the evidence. The Court shall finally determine any appropriate relief necessary.

44. Invocation of the dispute resolution provisions of this Section shall not extend or postpone any deadlines affected by the dispute.

XI. RIGHT OF ENTRY

45. EPA and MDNR, and their representatives, contractors and consultants and attorneys, shall have the authority to enter the plant and any other property, fixture, facility or office the operation or purpose of which is related to compliance with this Consent Decree, at all times, upon proper presentation of credentials, for the purposes of:

A. monitoring the progress of activities required under this Decree;

B. verifying any data or information submitted to EPA or MDNR in accordance with the terms of the Decree or the NPDES Permit;

C. obtaining samples, and, upon request, splits of any samples taken by Defendants or their consultants and

D. assessing Defendants' compliance with this Decree and the NPDES Permit.

This Section in no way limits or otherwise affects any right of entry held by the United States or MDNR pursuant to applicable to federal or state laws, regulations or permits, including 33 U.S.C. § 1318 and Section 4 of the WRCA.

XII. DIVISION OF RESPONSIBILITY AMONG DEFENDANTS

46. Regardless of whatever arrangements Defendants may make among themselves to allocate and undertake various tasks specified by the Decree, Wayne County is responsible to Plaintiffs for timely completion of all obligations imposed under the Decree. This paragraph does not limit the authority of the Plaintiffs to enforce this Consent Decree against any other Defendant who fails to meet any requirement of such Defendant hereunder. If the act or omission of any individual defendant community results in the imposition of a penalty under this Decree, the non-responsible defendant communities shall have the right to invoke the dispute resolution provisions of this Consent Decree to require the responsible community(s) to pay for the entire penalty. The possibility or pendency of any such dispute among the Defendants shall not relieve or delay Defendants' obligations to timely pay penalties.

XIII. APPROVAL AND FACILITY CONSTRUCTION

47. Nothing herein shall be interpreted as relieving Defendants from the obligation to apply for and receive all permits required by law to construct the facilities required under Section IV hereof.

XIV. FUNDING

48. Performance of the terms of this Consent Decree by Defendants is not conditioned on the receipt of any Federal or State grant and/or loan funds.

49. The legislative bodies of the Defendants shall adopt resolutions or ordinances to: approve amendments or supplements to existing contracts for the Downriver System, execute new contracts or accept assessment obligations or allocations of cost, approve plans and enter into or approve

construction contracts and issue and sell bonds, if needed, to acquire, finance or construct, all facilities and improvements required under this Consent Decree as approved by MDNR and U.S. EPA or required for compliance with NPDES permits, all in accordance with PA. 320 of 1927, as amended, M.C.L.A. 123.241 et seq., P.A. 202 of 1943, as amended, M.C.L.A. 131.1 et seq. M.S.A. 5.2661 et seq., and P.A. 185 of 1957, as amended, M.C.L.A. 123.731 et seq., M.S.A. 5.570 et seq. The Court may enter as required an order pursuant to said Act 320 regarding the terms and conditions of the contracts, bonds and other documents to be executed and delivered by the legislative bodies of Defendant in accordance with this paragraph, provided such order in no way alters, modifies, or conflicts with the deadlines; obligations, or items set forth in this Decree or set forth by applicable federal or state law.

53. Except to the extent that this Decree specifically provides otherwise, Defendants shall comply with all conditions and effluent limitations in the NPDES Permit and any modification or renewal thereof while this Consent Decree remains in effect.

XVIII. NON-WAIVER PROVISIONS

54. This Consent Decree in no way affects or relieves Defendants of the obligation to comply with all applicable Federal, State, and local laws and regulations and the applicable NPDES permit. This Decree shall not be construed to prevent or limit the rights of Plaintiffs to obtain penalties or injunctive relief under the Act or WRCA or other statutes or regulations, except as expressly provided herein.

55. The parties agree that Defendants are responsible for achieving and maintaining complete compliance with all applicable Federal and State laws, regulations, and

permits, and that compliance, or efforts to comply, with this Decree shall not be a defense to any actions commenced pursuant to any such laws, regulations or permits.

56. By entering this Consent Decree, the Plaintiffs do not waive any rights or remedies available to them for any violation of this Consent Decree, or any past, present or future violation by any Defendant of any Federal or State laws, regulations or permit conditions other than those civil claims for violations which were alleged in the Complaint in this action, as well as for any civil claim for civil penalties under the Federal Water Pollution Control Act, or the WRCA, for violations that occurred prior to the lodging of this Decree by the United States, and that arose from bypass, I/I, or operations and maintenance activities on the Downriver Collection and Treatment System.

57. Nothing herein shall be construed to limit the authority of the Plaintiffs to undertake any action against any person, including Defendants, in response to conditions that may present an imminent and substantial endangerment to the public health, welfare or the environment.

58. This Consent Decree does not limit or affect the rights of Defendants or of the Plaintiffs against any third parties.

59. The Plaintiffs reserve any and all legal and equitable remedies available to enforce the provisions of this Decree.

60. This Consent Decree does not resolve any Defendant's liability in either of the two other cases (E.D. Michigan Civ. Nos. 77-71100 -- United States v. City of Detroit, et al. -- and 89-72937 -- United States v. City of Detroit) consolidated with this action, and nothing in this Decree

affects or limits the relief that Plaintiffs may recover in those cases, nor does the Decree affect any rights or remedies available to any Defendant with respect to those actions.

XIX. CONTINGENT LIABILITY OF STATE OF MICHIGAN

61. This Consent Decree does not resolve the contingent liability of the State of Michigan under Section 309(e) of the Act, 33 U.S.C. Section 1319(e). The United States reserves, and this Decree is without prejudice to, any rights or claims that the United States has or may have against the State under Section 309(e) of the Act. The State of Michigan reserves, and this Decree is without prejudice to, any defenses that it may have to any claim under Section 309(e) of the Act. The State of Michigan declares that it believes there is no State law that would prevent Defendants from raising revenues needed to comply with any judgment in this action.

XX. RESOLUTION OF COUNTERCLAIMS

62. This Consent Decree resolves all counterclaims against the United States and the State of Michigan that were filed in this action, or which pursuant to Rule 13 of the Federal Rules of Civil Procedure could have been filed in this action, by any Defendant. Upon entry of this Consent Decree by the Court, all counterclaims filed by any Defendant against the United States or the State of Michigan are dismissed, with prejudice.

XXI. COSTS OF SUIT

63. - Each party shall bear its own costs and attorney's fees accrued prior to entry of this Consent Decree in this action.

XXII. MODIFICATION

64. There shall be no modification of this Consent Decree without written approval of all the parties to this Consent Decree and the Court. Nothing in this provision alters whatever rights accrue to the parties under the sections of this Decree entitled "Dispute Resolution" and "Force Majeure." Further, nothing in this provision is intended to limit any right any party may have to petition the Court for modification in accordance with Rule 60(b) of the Federal Rules of Civil Procedure.

XXIII. EFFECTIVE DATE AND CONTINUING JURISDICTION OF THE COURT

65. The Consent Decree shall be effective on the date, after conclusion of activities specified in Paragraph No. 70, on which this Court enters the Decree as its own order.

66. The Court shall retain jurisdiction for the purpose of ruling on any motion by any party to enforce the terms and conditions of this Decree, under applicable law, until this Decree is terminated in accordance with Section XXIV below.

67. Effective immediately upon entry of this Consent Decree by the Court, the Order issued by the Court in this action on July 2, 1993, is terminated. In acknowledgement of the fact that the City of Riverview issued bonds under the Order of July 2, 1993, the Parties acknowledge that this Decree is intended- to authorize and support the issuance

of those bonds to at least the same extent such issuance was authorized by the now-terminated Order of July 2, 1993.

XXIV. TERMINATION

68. This Consent Decree shall terminate either: (1) upon the Court's granting a motion by Plaintiffs, after Defendants have completed the Sewer Rehabilitation, WWTP Improvements, and Collection and Storage-transport facilities required under paragraphs 5 - 7 above, and paid the civil penalty due hereunder; or (2) upon the Court's granting a motion by Defendants, after certification by Defendants to Plaintiffs and the Court that Defendants have completed the Sewer Rehabilitation, WWTP Improvements, and Collection and Storage-transport facilities required under paragraphs 5 - 7 above, eliminated unpermitted bypass and overflow at all points in the Downriver Collection and Treatment System, achieved and maintained compliance with the final effluent limitations specified in the NPDES permit for at least twelve consecutive months, and have paid all penalties due hereunder.

69. Automatic Termination. If not terminated previously under the terms of Par. No. 68 above this Decree shall terminate automatically on January 1, 2004, provided all stipulated penalties demanded have been fully paid, and provided further that Defendants provided timely Final Project Certification under paragraph no. 8 of the Decree. If such certification is not timely made or if a CAP is warranted. under paragraph no. 8 of the Decree, then - - if the Decree has not been terminated previously under paragraph no. 68 above -- this Decree shall terminate automatically as follows, if and only if all stipulated penalties demanded have been paid in full:

(a) If the Project Certification in paragraph no. 8 has been provided and no CAP is required to be developed pursuant to paragraph no. 8, the Decree shall automatically terminate one year after submittal of the Final Project Certification under paragraph no. 8 or on January 1, 2006, whichever occurs first; or

(b) If a CAP is required to be developed pursuant to paragraph no. 8, the Decree shall automatically terminate one year after successful completion of the activities required by the CAP.

XXV. PUBLIC COMMENT

70. The parties agree and acknowledge that final approval by the United States and entry of this Decree is subject to the requirements of 28 C.F.R. Section 50.7, which provides for notice in the Federal Register of the lodging of this Consent Decree, an opportunity for the public to submit comments to the U.S. Department of Justice, and for the consideration by the Department of any comments.

For the United States of America:

United States Department of Justice
Environment & Natural Resources Division
Washington, D.C.
Date:

Lois J. Schiffer
Acting Assistant Attorney General

United States Department of Justice
Environmental Natural Resources Division

_____
Thomas A. Mariani, Esq.
Environmental Enforcement Section

Office of the United States Attorney
Eastern District of Michigan
By: _____
Peter Capla
Assistant United States Attorney

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GLORIA BYLINSKI, GEORGE COATES d/b/a D & A COLLISION, ALLAN COLLINS, DENNIS COATES, STEVEN HOLIDAY, SANDRA HOLIDAY, RICHARD PRESSEY, JIMMY SEACRIST and MOLLY SEACRIST, and all other persons similarly situated,

Plaintiffs,

vs.

CITY OF ALLEN PARK, a Michigan municipal corporation,
CITY OF ECORSE, a Michigan municipal corporation,
CITY OF LINCOLN PARK, a Michigan municipal corporation,
CITY OF RIVER ROUGE, a Michigan municipal corporation,
CITY OF SOUTHGATE, a Michigan municipal corporation,
CITY OF TAYLOR, a Michigan municipal corporation,

Defendants

Filed: 3/4/98

There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in this complaint.

CLASS ACTION COMPLAINT AND JURY DEMAND

NOW COME the Plaintiffs, GLORIA BYLINSKI, GEORGE COATES d/b/a D & A COLLISION, ALLAN

COLLINS, DENNIS COATES, STEVEN HOLIDAY, SANDRA HOLIDAY, RICHARD PRESSEY, JIMMY SEACRIST and MOLLY SEACRIST, and all other persons similarly situated (hereinafter referred to as "Plaintiffs"), by and through their attorneys, MACUGA, SWARTZ and LIDDLE, P.C., by Peter W. Macuga II and Rene S. Roupinian, and for their Complaint state;

I. NATURE OF ACTION

1. This matter is necessary to compel the refund of and enjoin the imposition and further collection from Plaintiffs by way of an illegal and unconstitutional property tax assessment of a March 14, 1994 judgment without voter approval in contravention of the Headlee Amendment to the Michigan Constitution.

2. Plaintiffs bring this action on behalf of themselves and all taxpayers who have similarly been assessed and paid real property and personal property taxes, without voter approval, to Defendants for the "Wayne County Judgment". The reason for not joining all of the taxpayers as Plaintiffs is that they number in the tens of thousands, thereby making it impractical to bring them before the court.

3. There are many persons who have been similarly treated by Defendants, and the question to be determined is one of common and general interest to many persons constituting the class, to which Plaintiffs belong, and who are so numerous as to make it impracticable to bring them all before the court, for which reason Plaintiffs sue for all persons similarly situated pursuant to Michigan Court Rules of 1985, 3.501.

II. RELIEF REQUESTED

4. Plaintiffs are seeking:

A. Declaratory Relief;

B. Injunctive Relief;

C. Refund of all taxes paid with interest;

D. Costs;

E. Attorneys fees;

III. JURISDICTION

5. This court has jurisdiction over this cause of action pursuant to MCL §600.711 (a); MSA §27A.711 (1), (3).

IV. VENUE

6. Venue is appropriate in Wayne County because all of the Plaintiffs' real property which has been assessed taxes as a result of the "Wayne County Judgment" without voter approval is situated in Wayne County and all of the Defendants are situated in Wayne County.

V. PARTIES

7. Plaintiff, GLORIA BYLINSKI, is a resident of Allen Park and owns real property and personal property located at 15809 Belmont, Allen Park, Michigan, 48101.

8. Plaintiff, GEORGE COATES, was and is doing business as D & A COLLISION and owns real property

and personal property located at 3965 West Jefferson, Ecorse, Michigan, 48229.

9. Plaintiff, ALLAN COLLINS, is a resident of Lincoln Park and owns real property and personal property located at 2095 Keppen, Lincoln Park, Michigan, 48146.

10. Plaintiff, DENNIS COATES, is a resident of River Rouge and owns real property and personal property located at 17 Louis, River Rouge, Michigan, 48128.

11. Plaintiffs, STEVEN HOLIDAY and SANDRA HOLIDAY, are residents of Southgate and own real property and personal property located at 14500 Agnes, Southgate, Michigan, 48195.

12. Plaintiff, RICHARD PRESSEY, is a resident of Taylor and owns real property and personal property located at 25275 Madden, Taylor, Michigan, 48180.

13. Plaintiffs, JIMMY SEACRIST and MOLLY SEACRIST, are residents of Taylor and own real property and personal property located at 25098 Chestnut, Taylor, Michigan, 48180.

14. The class consists of all persons who own real property and personal property located in Defendants' municipalities within Wayne County and have paid or will pay taxes levied against them as a result of the March 14, 1994 Judgment, if the tax is not declared unconstitutional.

15. Defendant Allen Park is organized pursuant to the Constitution of the of Michigan as a municipal corporate body with powers and immunities provided by law.

16. Defendant Ecorse is organized pursuant to the Constitution of the State of Michigan as a municipal corporate body with powers and immunities provided by law.

17. Defendant Lincoln Park is organized pursuant to the Constitution of the State of Michigan as a municipal corporate body with powers and immunities provided by law.

18. Defendant River Rouge is organized pursuant to the Constitution of the State of Michigan as a municipal corporate body with powers and immunities provided by law.

19. Defendant Southgate is organized pursuant to the Constitution of the State of Michigan as a municipal corporate body with powers and immunities provided by law.

20. Defendant Taylor is organized pursuant to the Constitution of the State of Michigan as a municipal corporate body with powers and immunities provided by law.

VI. GENERAL ALLEGATIONS

21. The Headlee Amendment to the Constitution of Michigan of 1963 (Art. IX § 25-34) was ratified by the qualified electorate of the State of Michigan on November 7, 1978.

22. Pursuant to § 31 of the Headlee Amendment to the Michigan Constitution, local governments are prohibited from levying any tax not authorized by law or charter without the approval of a majority of the qualified electorate of that unit of local government.

23. On March 14, 1994, Federal District Court Judge John Feikens entered judgment against Defendants

imposing upon Defendants a portion of the costs of improvements to the Downriver Sewage Disposal System ("DSDS") and Defendants' local sewage systems.

24. On or about 1995 Defendants began assessing the costs of the judgment against Plaintiffs by placing on Plaintiffs' respective real and personal property tax bills a tax described as "EPA Judgment", "EPA Levy", or "EPA/Wayne County Judgment", remove (hereinafter "Sewage Tax").

25. That Sewage Tax has been assessed and collected by Defendants without benefit of a vote and without prior voter approval as required by Art. IX, §31.

26. Each of the Plaintiffs have paid, or are subject to pay, the Sewage Tax.

VIII. COUNT I

HEADLEE AMENDMENT

27. Plaintiffs reallege paragraphs 1-32 set forth above as though they were fully set forth herein.

28. Defendants may only impose those taxes expressly authorized by statute and which comport with constitutional mandates.

29. The Sewage Tax is unconstitutional under Art IX §31 of the Michigan Constitution which states in relevant part:

> Units of local government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of

an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electorate of that unit of Local Government voting thereon.

30. The Sewage Tax constitutes a levy of a tax not authorized by law or charter at the time that the Headlee Amendment was enacted.

31. No election by the qualified electorate to approve the Sewage Tax was ever scheduled or held by Defendants.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

A. Declare the Sewage Tax unconstitutional as applied because the tax violates Art IX §31 of the Michigan Constitution;

B. Enjoin the Defendants from continuing to collect the contested Sewage Tax;

C. Order that the Defendants refund all monies with interest that have been unconstitutionally collected pursuant to the unconstitutional Sewage Tax; and

D. Award Plaintiffs' costs and attorney fees and grant any other relief this Honorable Court deems equitable, proper and just.

MACUGA, SWARTZ and LIDDLE, PC

PETER W. MACUGA II
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JURY DEMAND

NOW COME the Plaintiffs, GLORIA BYLINSKI, GEORGE COATES d/b/a D & A COLLISION, ALLAN COLLINS, DENNIS COATES, STEVEN HOLIDAY, SANDRA HOLIDAY, RICHARD PRESSEY, JIMMY SEACRIST and MOLLY SEACRIST, and all other persons similarly situated, by and through their attorneys, MACUGA, SWARTZ and LIDDLE, P.C., by Peter W. Macuga and Rene S. Roupinian, and hereby demand a trial by jury in the within cause.

MACUGA, SWARTZ and LIDDLE, PC

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Dated: March 4, 1998
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*97225 M.C.L.A. 600.6093

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 600. REVISED JUDICATURE ACT OF 1961
REVISED JUDICATURE ACT OF 1961
CHAPTER 60. ENFORCEMENT OF JUDGMENTS

Current through P.A. 1998, No. 35

600.6093. Collection of judgment against township, village, city or county

Sec. 6093. (1) Whenever judgment is recovered against any township, village, or city, or against the trustees or common council, or officers thereof, in any action prosecuted by or against them in their name of office, the clerk of the court shall, on the application of the party in whose favor judgment is rendered, his attorney, executor, administrator, or assigns, make and deliver to the party so applying a certified transcript of the judgment, showing the amount and date thereof, with the rate of interest thereon, and of the costs as taxed under the seal of the court, if in a court having a seal. The party obtaining the certified transcript may file it with the supervisor of the township, if the judgment is against the township, or with the assessing officer or officers of the city or village, if the judgment is against a city or village. The supervisor or assessing officer receiving the certified transcript or transcripts of judgment shall proceed to assess the amount thereof with the costs and interests from the date of rendition of judgment to the time when the warrant for the collection thereof will expire upon the taxable property of the township, city, or village upon the then next tax roll of such township, city, or village, without any other or further certificate than the certified

transcript as a part of the township, city, or village tax, adding the total amount of the judgment to the other township, city, or village taxes and assessing it in the same column with the general township, city, or village tax.

The supervisor or assessing officer shall set forth in the warrant attached to the tax roll each judgment separately, stating the amount thereof and to whom payable, and it shall be collected and returned in the same manner as other taxes. The supervisor or assessing officer, at the time when he delivers the tax roll to the treasurer or collecting officer of any township, city, or village, shall deliver to the township clerk or to the clerk or recording officer of the city or village, a statement in writing under his hand, setting forth in detail and separately the judgment stating the amount with costs and interest as herein provided, and to whom payable. The treasurer or collecting officer of the township, city, or village, shall collect and pay the judgment to the owner thereof or his attorney, on or before the date when the tax roll and warrant shall be returnable. In case any supervisor, treasurer, or other assessing or collecting officer neglects or refuses to comply with any of the provisions of this section he shall be guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not more than $1,000.00 and costs of prosecution, or imprisonment in the county jail for a period not exceeding 3 months, or by both fine and imprisonment in the discretion of the court. Nothing herein contained shall be construed to exclude other remedies given by law for the enforcement of the judgment.

***97226** (2) In any case where a judgment is recovered against a village which, by reason of holding no municipal elections, or for any other reason has no available assessing officer within the jurisdiction of the court wherein the

judgment is rendered, the owner of the judgment or any person knowing the facts, acting on behalf of the owner, may make an affidavit showing that the village against which a judgment is pending and unsatisfied, has no available assessing officer within the jurisdiction, and file it with the clerk of the court wherein the judgment is written. The officer who makes the certified transcript shall attach thereto a copy of the affidavit, the correctness of which copy shall also be certified to in the certificate. Any party receiving the certified transcript of judgment and affidavit may file it with the supervisor of the township in which the village, having no assessing officer is located. The supervisor shall assess the amount of the judgment with costs and interest, upon the taxable property of the village, which is without an assessing officer, and thereafter the same steps and proceedings shall be had in the premises as though it were a judgment against the township within which the village is located, except that it shall be assessed against the property within the corporate limits of the village only.

(3) When judgment is recovered against any county or the board of supervisors or any county officer in an action prosecuted by or against him in his name of office, the judgment unless reversed shall be levied and collected as other county charges, and when collected shall be paid by the county treasurer to the person to whom the judgment has been adjudged upon the delivery of a proper voucher therefor.

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 324. NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT
NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT
ARTICLE II. POLLUTION CONTROL
CHAPTER 1. POINT SOURCE POLLUTION CONTROL
SEWAGE DISPOSAL AND WATERWORKS SYSTEMS
PART 43. WATERWORKS SYSTEMS, SEWERS, AND DISPOSAL PLANTS

Current through P.A. 1998, No. 35

324.4307. Bonds, issuance, sale, interest, term, denomination, payment, taxation

Sec. 4307. (1) In accordance with and to the extent authorized by law, when the department, the department of public health, or a court of competent jurisdiction in the state has ordered, or when the department has issued a permit for, the installation, construction, alteration, improvement, or operation of a sewage system, solid waste facility, or waterworks system in a local unit of government, and the plans for the facility or system have been prepared and approved by the state department or commission having the authority by law to grant the approval, the legislative body or the respective legislative bodies of the local unit or units of government may issue and sell the necessary bonds for the construction, installation, alteration, operation, or improvement, including the treatment works, and other facilities as may be ordered or set forth in the permit as being necessary to provide for the effective operation of the system. This provision shall be

construed to allow a local unit of government the option of selling bonds under a department order or permit, or of taking or permitting the matter to go into court and selling bonds under a court order. The bonds shall bear interest at a rate not to exceed the maximum rate permitted by the municipal finance act, Act No. 202 of the Public Acts of 1943, being sections 131.1 to 139.3 of the Michigan Compiled Laws, and be payable in not more than 40 years from the date of issuance. The legislative body or the respective legislative bodies shall determine the denomination of the bonds and the date, time, and manner of payment. The amount of the bonds either issued or outstanding shall not be included in the amount of bonds which the local unit or units of government are authorized to issue under any statutes of this state or charters. Local units of government issuing bonds under this section may raise a sum annually by taxation as the legislative body or respective legislative bodies consider necessary to pay interest on the bonds, and to pay the principal as it falls due. The annual amount may be in excess of the authorized annual tax rate fixed by the statutes or charters.

***42340** (2) Except as otherwise provided in this part, all bonds issued under this section shall be issued and sold in conformity with Act No. 202 of the Public Acts of 1943. Court ordered bonds do not require approval of the electors and are not subject to section 5(g) of Act No. 279 of the Public Acts of 1909, being section 117.5 of the Michigan Compiled Laws, as to publication of notice, petition, and referendum. Bonds other than court ordered bonds issued under this part require approval of the electors at a general or special election only if an appropriate petition is filed in accordance with the law.

CONSTITUTION OF THE STATE OF MICHIGAN OF 1963

ARTICLE IX. FINANCE AND TAXATION

MCL Const. 1963, Art. 9, | 6 (1992)

| 6. Real and tangible personal property; limitation on general ad valorem taxes; adoption and alteration of separate tax limitations; exceptions to limitations; property tax on school district extending into 2 or more counties.

Section 6. Except as otherwise provided in this constitution, the total amount of general ad valorem taxes imposed upon real and tangible personal property for all purposes in any one year shall not exceed 15 mills on each dollar of the assessed valuation of property as finally equalized. Under procedures provided by law, which shall guarantee the right of initiative, separate tax limitations for any county and for the townships and for school districts therein, the aggregate of which shall not exceed 18 mills on each dollar of such valuation, may be adopted and thereafter altered by the vote of a majority of the qualified electors of such county voting thereon, in lieu of the limitation hereinbefore established. These limitations may be increased to an aggregate of not to exceed 50 mills on each dollar of valuation, for a period of not to exceed 20 years at any one time, if approved by a majority of the electors, qualified under Section 6 of Article II of this constitution, voting on the question.

The foregoing limitations shall not apply to taxes imposed for the payment of principal and interest on bonds approved by the electors or other evidences of indebtedness approved by the electors or for the payment of assessments or contract obligations in anticipation of which bonds are issued approved

by the electors, which taxes may be imposed without limitation as to rate or amount; or, subject to the provisions of Section 25 through 34 of this article, to taxes imposed for any other purpose by any city, village, charter county, charter township, charter authority or other authority, the tax limitations of which are provided by charter or by general law.

In any school district which extends into two or more counties, property taxes at the highest rate available in the county which contains the greatest part of the area of the district may be imposed and collected for school purposes throughout the district.

HISTORY: Const. 1963, Art. IX, | 6, Eff. Jan. 1, 1964;--Am. Initiated Law, approved Nov. 7, 1978, Eff. Dec. 23, 1978.

CONSTITUTION OF THE STATE OF MICHIGAN OF 1963

ARTICLE IX. FINANCE AND TAXATION

MCL Const. 1963, Art. 9, | 31 (1992)

| 31. Levying tax or increasing rate of existing tax; maximum tax rate on new base; increase in assessed valuation of property; exceptions to limitations.

Sec. 31. Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. If the definition of the base of an existing tax is broadened, the maximum authorized rate of taxation on the new base in each unit of Local Government shall be reduced to yield the same estimated gross revenue as on the prior base. If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the General Price Level from the previous year, the maximum authorized rate applied thereto in each unit of Local Government shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the General Price Level, as could have been collected at the existing authorized rate on the prior assessed value.

The limitations of this section shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments on contract obligations in anticipation of which bonds

are issued which were authorized prior to the effective date of this amendment.

HISTORY: Add. Initiated Law, approved Nov. 7, 1978, Eff. Dec. 23, 1978.